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Submitted August 13, 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

COMCAST CABLE COMMUNICATIONS, INC., a Pennsylvania Corporation, Claimant, vs. PACIFICORP, dba UTAH POWER, an Oregon Corporation, Respondent.	**Docket No. 03 035 28** **PRE-HEARING BRIEF**

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I. INTRODUCTION

Comcast filed the above captioned Request for Agency Action after being forced by PacifiCorp to pay more than $3.8 million in unilaterally imposed "unauthorized" pole attachment penalties. After the filing of this docket, PacifiCorp continued to generate these fees. To date, PacifiCorp has forced Comcast to pay in excess of $5.4 million in so-called "unauthorized" attachment penalties. PacifiCorp generated these charges by claiming that Comcast must pay a penalty of $250 for each and every attachment which Comcast cannot prove it has received written permission from PacifiCorp to attach. PacifiCorp claims – again to date – that Comcast has more than 35,000 "unauthorized" attachments in Utah. According to PacifiCorp, Comcast is liable for more than $8,750,000 in "unauthorized" attachment penalties.

PacifiCorp bases this claim on unsupported assertions that it performed a baseline or "amnesty" audit from 1997-1999 ("1997/1999 Audit") and that the 35,000 poles that it now claims are unauthorized Comcast attached to at some point in the last four to five years since the 1997/1999 Audit was completed. Comcast vigorously disputes these claims.

In addition, PacifiCorp claims that Comcast owes an additional $13.25 per attachment to compensate PacifiCorp's audit contractor, Osmose. PacifiCorp has invoiced Comcast this $13.25 per attachment despite the fact that Osmose only charged PacifiCorp $12.27 per pole. Relying on PacifiCorp's most recent pole invoice which shows that Comcast is attached to approximately 105,000 poles, PacifiCorp is claiming that Comcast is liable for an additional $1,391,250 in audit related charges, for a grand total of more than $10 million. The contract between PacifiCorp and Osmose requires PacifiCorp to pay Osmose the amount of $10 million to audit all PacifiCorp's 1.4 million poles across its multi-state service area. It is more than mere coincidence that PacifiCorp has invoiced Comcast for almost the exact amount of the

entire cost of Osmose's multi-state audit. A simple comparison of numbers reveals PacifiCorp's clear plan to force Comcast to pay the entire cost of its multi-state audit.

The approximately $10 million in dispute (of which Comcast today has paid $5.4 million), is only the tip of the iceberg. The 2003 Audit did far more than count Comcast attachments to PacifiCorp poles, it purported to identify approximately 15,000 safety violations on its poles, and to assign cost responsibility to Comcast to repair each of those safety violations. More troubling, PacifiCorp has indicated an intention to impose fines on Comcast for what it deems "safety violations," exactly as it has for what it deems "unauthorized" attachments.[1]

As set forth more fully below, PacifiCorp is seeking to import into Utah, from its home state of Oregon, the identical $250 unauthorized attachment penalty in place (but subject now to several legal challenges). Oregon also has a $250 penalty for safety violations (likewise now subject to legal challenge). Comcast has every reason to believe that PacifiCorp intends to impose that same penalty on Comcast. Applying the $250 safety violation penalty to the initial batch of 15,000 violations that PacifiCorp is attempting to foist on Comcast, adds an additional $3.75 million to Comcast's tab, exclusive of repair costs that could potentially run to $10 million or more.

Notwithstanding the substantial sums that PacifiCorp is attempting to collect from Comcast, prevailing law and the specific facts of this case not only prevent PacifiCorp from charging Comcast these amounts, but require the immediate refund of all amounts paid to date.

First and most important, the $250 unauthorized penalty is illegal in 32 states, including in virtually every one of Utah's neighboring states. Second, PacifiCorp's claims that Comcast has made more than 35,000 new attachments to its poles in only four or five years after

[1] Supplemental Response of PacifiCorp to Claimant's First Set of Data Requests, Response to Data Request No. 9, p. 15, attached hereto as Exhibit 4.

PacifiCorp's supposed 1997/1999 "baseline" is completely without merit. To even come close to approaching those numbers, Comcast would have had to build approximately 1,000 miles of new plant. Neither Comcast, nor any other established cable operator, has experienced system expansion or growth like that since the mid to late 1980's. While Comcast has upgraded its system, it has done so by enhancing attachments that have been on PacifiCorp's poles for many years prior to the 1997/1999 Audit.

In the face of these clear facts, set forth in greater detail below, PacifiCorp argues nothing more than a caricature of Comcast, its employees and its contractors as either incompetents or outlaws (or both); fanciful notions that $250 is a reasonable charge (and did not come from Oregon); an argument that the 1997/1999 Audit was a reliable base line, despite PacifiCorp's complete inability to produce any type of report or document evidencing that such an audit even took place; mistaken assertions that Comcast has made 35,000 new attachments in the last five years; and an unsubstantiated idea that Comcast casts plant and worker safety to the four winds.

The dispute is real enough, but it is a dispute prompted by PacifiCorp's rapacious objectives to convert its essential pole facilities that are absolutely necessary for the provision of advanced broadband services into a cash cow. (PacifiCorp's recent attempts to raise rates from $4.65 to $29.40 per pole are ample evidence alone of that intention.) The dispute is also prompted by PacifiCorp's intention to use the supposedly "deep pockets" of Comcast to pay for plant audits, digital mapping databases and to renew PacifiCorp's distribution network. To the extent that these are legitimate and prudent utility undertakings, PacifiCorp, not Comcast, should be financing them.

Finally, resolution of this dispute requires a clean slate: dissolution of any Comcast liability for "unauthorized" attachments and (Osmose) audit contractor charges and an immediate refund. The parties should then be directed to agree to a number of attachments today and a procedure for auditing and accounting for them in the future. Exhibit PC 9.2, attached to the Prepared Sur-Rebuttal Testimony of Thomas Jackson, and proffered by that PacifiCorp witness, is a reasonable approach that Comcast will accept today. After that, the next step is to separate rhetoric from reason, fiction from fact and fancy from reality to identify the real operational issues (*e.g.*, permitting, safety, plant clean-up) and reach agreements for addressing these important issues so that a case like this does not clog the Commission's docket again.[2]

II. CHRONOLOGY OF THIS CASE

A. The Parties

Comcast is a provider of broadband communications service, which today includes "traditional" cable television service as well as information services and high-speed cable modem services for residential and business customers within the State. In addition to these services, Comcast is and/or will be offering state-of-the-art broadband services such as video on demand and Internet-Protocol ("IP") enabled communications services, including Voice Over IP telephone services. Comcast has been working hard to bring the full complement of broadband products and services to its service areas within the State of Utah. Through its predecessors, which include Tele-Communications, Inc. ("TCI"), Insight Cablevision, and AT&T Broadband, Comcast has been providing communications services to residents of Utah since the 1970's.

[2] The parallel proceeding pending at the Commission may provide some guidance in reaching such an agreement between the parties in this case. *See* In the Matter of an Investigation into Pole Attachments, Docket No. 04-999-03.

In order to provide those services, Comcast must install a significant portion of its communications facilities on utility poles owned by, among others, PacifiCorp (and its predecessor Utah Power). Many of Comcast's attachments date back several decades, prior to PacifiCorp's acquisition of Utah Power. Because PacifiCorp owns and controls the vast majority of poles in Utah, Comcast and its predecessors have little choice but to rent space on PacifiCorp's poles. Although the parties' joint use relationship has historically been very cooperative, a series of events beginning in 2002 drastically changed that.

B. The Seeds of Discord

Approximately 2½ years ago, in December 2001, PacifiCorp notified AT&T Broadband (Comcast's predecessor) of its intention to terminate the pole attachment agreement that the parties had executed just two years before,[3] in December 1999 ("1999 Agreement").[4] Because Section 10.1 of the agreement required PacifiCorp to give 365 days' notice, the termination was effective December 31, 2002.[5]

PacifiCorp had no reasonable justification for canceling the agreement just two years after it was executed. It did so in an obvious effort to increase its leverage as the owner of essential facilities[6] and force Comcast to accept terms even more favorable to PacifiCorp than those contained in the 1999 Agreement. The new "standard" contract PacifiCorp submitted contains onerous terms to which Comcast cannot agree.[7] As a result, the parties have not executed a new pole attachment agreement, even though the 1999 Agreement expired on

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[3] *See* Response of PacifiCorp to Request of For Agency Action ("Response"), submitted Dec. 1, 2003.

[4] The 1999 Agreement is attached as Exhibit A to Comcast's Request for Agency Action, submitted Oct. 31, 2003.

[5] *See* Response ¶ 8; Declaration of Corey Fitz Gerald, ¶5, submitted Dec. 1, 2003; Initial Testimony of Corey Fitz Gerald, p. 11, submitted July 2, 2004.

[6] *See* Rebuttal Testimony of Corey Fitz Gerald, p. 22, submitted July 14, 2004.

[7] *See* Rebuttal Testimony of JoAnne Nadalin, p. 8, submitted July 14, 2004.

December 31, 2002.[8] Contrary to PacifiCorp's assertions,[9] Comcast has not intentionally delayed negotiating the new agreement. Comcast has not signed the PacifiCorp agreement because it contains onerous and unacceptable terms that Comcast cannot agree to[10] and that the Division of Public Utilities ("DPU") declined to incorporate into its proposed rules governing pole attachments.[11]

After PacifiCorp terminated the 1999 Agreement, Comcast continued to apply for pole attachment permits, pay the rental charges invoiced by PacifiCorp, as well as application and inspection fees unilaterally imposed by PacifiCorp but never included in the 1999 Agreement, and otherwise maintain a normal working relationship with PacifiCorp.[12]

C. PacifiCorp Commences A Comprehensive, System-wide Audit Without Notice To, Or Input From, Comcast

On July 3, 2002, unbeknownst to Comcast, PacifiCorp issued a Request For Proposal ("RFP") soliciting bids from contractors to conduct a pole inventory.[13] The proposed project included a comprehensive survey of all of the poles PacifiCorp owns in its multi-state service area, all of the attachments on PacifiCorp's poles, and all of the poles owned by others bearing PacifiCorp's facilities.[14] PacifiCorp entered into a contract with Osmose to conduct the inventory.[15] According to the terms of the contract, Osmose was to begin work November 1,

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[8] *See* Fitz Gerald Decl. ¶ 6.

[9] Fitz Gerald Initial Testimony p. 11.

[10] *See In the Matter of An Investigation into Pole Attachments,* Comcast's Comments to the Draft Proposed Rule and Contracts of the Division of Public Utilities, Docket No. 04-999-03, submitted June 21, 2004, attached hereto as Exhibit 1.

[11] *See In the Matter of An Investigation into Pole Attachments,* DPU Draft of Pole Attachment Rules, Docket No. 04-999-03, submitted July 12, 2004.

[12] Response ¶ 22; Fitz Gerald Decl. ¶ 6; Fitz Gerald Initial Testimony p. 12.

[13] *See* Request For Proposal, dated July 3, 2002, Bates No. PCD1 -79, attached hereto as Exhibit 2.

[14] *Id.*

[15] *See* Contract Between PacifiCorp and Osmose, Inc. for Completion of our Utility Pole Inventory and Inspection Project, Contract # 3000017122, attached hereto as Exhibit 3.

2002.[16] The projected value of the contract between Osmose and PacifiCorp was approximately $10 million.[17] Not coincidentally, the total value of unauthorized attachment penalties and audit charges PacifiCorp invoiced Comcast is also approximately $10 million.[18]

Although PacifiCorp commissioned the audit, "to identify the ownership of all third-party attachments to PacifiCorp poles as well as to determine whether such attachments are in compliance with the requirements of PacifiCorp's Distribution Construction Standards [and] the National Electrical Safety Code,"[19] and has passed these costs on to Comcast, PacifiCorp never sought input from Comcast on the design of the audit, the selection of contractors or any other significant element of the initiative.[20] Further, Comcast has no record of ever receiving any notice of the audit until after it was well under way.[21]

PacifiCorp used the results of the audit to identify unauthorized attachments and implement the unlawful $250 penalty. This was a drastic departure from the parties past practices. Basic tenets of good faith, fair dealing and reasonableness, at a minimum, required an explanation of the audit and penalty program *in advance* of its start, not to mention an opportunity to participate.[22]

Not surprisingly, PacifiCorp claims that it provided adequate notice by a) discussing the audit in general terms with AT&T Broadband staff in Portland and b) sending a notice 30 days before work supposedly was to begin.[23] Such notice, to the extent actually made,

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[16] *Id*. at 1.

[17] Supplemental Response of PacifiCorp to Claimant's First Set of Data Requests, Response to Data Request No. 7, p. 12, submitted April 1, 2004, attached hereto as Exhibit 4.

[18] Initial Testimony of JoAnne Nadalin submitted July 2, 2004, p. 7.

[19] Exhibit 4, Response to Data Request No. 5, p. 9.

[20] Sur-rebuttal Testimony of JoAnne Nadalin, pp. 2-4, submitted July 22, 2004.

[21] Nadalin Rebuttal Testimony pp. 4-5.

[22] *See* Nadalin Sur-rebuttal Testimony, pp. 3-4.

[23] *See* Fitz Gerald Initial Testimony, pp. 20-21.

was deficient. Comcast has no record of receiving the "30-day" notices.[24] The only evidence PacifiCorp has of these notices are *unsigned* letters that PacifiCorp produced in discovery addressed to Michael Sloan, an AT&T Broadband employee that left the AT&T shortly after it merged with Comcast in late 2002.[25] More important, these notices were *not* sent 30 days before the 2003 Audit began. For example, one of the first such letters was dated December 30, 2002 and stated:

> This letter is to inform you of PacifiCorp's joint use inspection through our service areas in Oregon, Washington, Utah, Wyoming, Idaho and California. The inspection *will be starting* in Layton, UT within approximately 30 days from the date of this notice.
>
> Upon completion, you will be notified of any unauthorized attachments, as well as any compliance issues.[26]

According to this letter, the inspection was not scheduled to begin until approximately January 30, 2003. However, Comcast began receiving invoices for alleged unauthorized attachments by February 6, 2003.[27] Ms. Fitz Gerald's explanation that PacifiCorp was able to collect field data, upload it to PacifiCorp's joint use database ("JTU"), compare it with existing data and issue an invoice within 6 days is simply not plausible.[28] In fact, Ms. Fitz Gerald, herself, acknowledged at deposition there is a 90 day turn around time on unauthorized attachment notifications:

> I believe it is approximately 90 days before a district is completed before a licensee would receive any notification from us of whether or not they had unauthorized attachments.[29]

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[24] *See* Nadalin Rebuttal Testimony pp. 4-5.
[25] *See* "30-day Notice" Letters, attached to Response; Nadalin Rebuttal Testimony, p. 4.
[26] *Id*.
[27] *See* Nadalin Rebuttal Testimony, p. 5.
[28] *See* Fitz Gerald Sur-rebuttal Testimony, p.6.
[29] *See* Deposition of Corey Fitz Gerald, taken May 13, 2004, p. 97, attached hereto as Exhibit 5.

Moreover, according to the terms of PacifiCorp's agreement with Osmose, work was to begin November 1, 2002.[30] That combined with the 90 day processing time, points to only one logical conclusion: the survey began in November exactly as the Osmose/PacifiCorp contract provides. PacifiCorp's claims that it provided advance notice are patently false.

Furthermore, any informal discussions Ms. Fitz Gerald had in 2002 with AT&T Broadband employees in Portland (or Denver) are not sufficient notice of the audit. PacifiCorp's penalty program represents a significant departure from PacifiCorp's past practices[31] and the dollars at stake for both audit and penalty charges clearly show that this was a massive undertaking. Considering the parties' history of cooperative and friendly relations[32] and considering the unprecedented magnitude of the project, PacifiCorp should have actively sought Comcast's involvement *before* the audit began and allowed Comcast the opportunity to participate both in contractor selection and audit design.[33] It quickly became clear, by PacifiCorp's conduct when the first waves of million-dollar penalties rolled into Comcast, that this was no cooperative arms-length business deal. It was an ambush.

D. PacifiCorp Shuts Down Comcast's Upgrade Until Disputed Penalties Are Paid

Beginning in early February 2003 the $250 per-pole invoices started coming into Comcast.[34] Comcast understandably balked at paying those charges.[35] PacifiCorp had terminated the contract and Comcast never agreed to pay this penalty amount. More important, Comcast knew from experience this $250 penalty provision was illegal in 32 states. As

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[30] *See* Exhibit 3.

[31] *See* Section IV.C., *infra*.

[32] *See* Initial Testimony of Rodney Bell, p.2, submitted July 2, 2004; Sur-rebuttal Testimony of Rodney Bell, submitted July 22, 2004, pp. 2-3; Initial Testimony of Mark Deffendall, submitted July 2, 2004, p.8.

[33] *See* Nadalin Sur-rebuttal Testimony, p. 4.

[34] *See* Nadalin Rebuttal Testimony, p. 5; Fitz Gerald Decl. ¶ 13.

[35] *See, e.g.,* Letter Agreement dated September 8, 2003, attached to Request for Agency Action as Exhibit N; Nadalin Initial Testimony pp. 3-4.

discussed more fully below, Comcast predecessors in Colorado, TCI and AT&T Broadband, were forced to litigate this very same $250 penalty at the FCC and in federal and state courts. Nonetheless, by July 2003, PacifiCorp retaliated by not merely ceasing to process Comcast's pole attachment applications in Utah, but by refusing to permit any Comcast application in all PacifiCorp states where Comcast had attachments on PacifiCorp poles because Comcast had not paid the invoices for the alleged unauthorized attachments in Utah.[36] Indeed, Comcast's Utah employees first learned about the crisis from its vice president and general manager for the Portland, Oregon system.[37] This abusive tactic, which PacifiCorp used again earlier this year[38] (and which gave rise to the April emergency hearing in this matter[39]) is an illustration of why pole attachments have been highly regulated since 1978.

Since 1999 and continuing through the present, Comcast has been upgrading its network to provide advanced services to consumers.[40] Since pole attachments are essential to Comcast's ability to conduct business and complete its upgrade, Comcast had no choice but to pay PacifiCorp's ransom.[41] As a result, on September 8, 2003, PacifiCorp and Comcast entered into a letter agreement pursuant to which Comcast "agreed" to pay PacifiCorp $3,828,000 under protest and PacifiCorp agreed to resume processing Comcast's pole attachment applications.[42] In essence, the agreement memorialized Comcast's payment of the disputed amounts but did not

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[36] *See* Nadalin Initial Testimony, pp. 2-3; Response ¶ 28; Fitz Gerald Initial Testimony, p. 35.

[37] *See* Nadalin Initial Testimony, pp. 2-3.

[38] *See* Nadalin Initial Testimony, p. 6.

[39] *See* Comcast's Motion For Immediate Relief and Declaratory Ruling, submitted March 23, 2004; Order on Motion for Immediate Relief, issued Apr. 30, 2004.

[40] *See* Nadalin Initial Testimony, p. 3; Request for Agency Action; Motion for Immediate Relief.

[41] *See* Nadalin Initial Testimony, p. 5.

[42] *See* Letter Agreement dated September 8, 2003 attached as Exhibit N to Request for Agency Action.

require PacifiCorp to do anything it would not have been otherwise obligated to do, which was to processing Comcast's applications.[43]

After Comcast made the $3.828 million payment, PacifiCorp resumed processing applications.[44]

E. Comcast Filed This Request For Agency Action

Although PacifiCorp resumed processing permits, it also continued to survey Comcast's facilities and assess "unauthorized" attachment penalties. On October 31, 2003, Comcast filed the Request for Agency Action in this matter. The Request seeks a determination by the Commission that PacifiCorp is not entitled to a $250 per attachment penalty for the attachments it deems "unauthorized" because: (1) the attachments were properly permitted, and (2) a $250 penalty is unjust and unreasonable.[45]

Comcast's Request for Agency Action did nothing to slow the waves of $250 penalties that continued to roll in. In December 2003, PacifiCorp demanded, and Comcast paid, an additional $1.3 million in unauthorized attachment penalties and approximately $300,000 in audit charges.[46]

F. In March 2003, PacifiCorp Shut Down Comcast's Operations For A Second Time.

Another $2,018,850 in penalty and audit-related invoices flowed in to Comcast between December 2003 and February 2004. By letter dated February 20, 2004, PacifiCorp informed Comcast that unless Comcast paid all outstanding current and past due "unauthorized" attachment penalties by March 1, 2004, PacifiCorp would suspend processing Comcast's pole

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[43] Because the agreement only required PacifiCorp to do that which it was already required to do by law, the agreement lacked consideration.

[44] *See* Nadalin Initial Testimony, p. 5; Fitz Gerald Initial Testimony, p. 35.

[45] *See* Request for Agency Action.

[46] *See* Nadalin Initial Testimony, p. 6.

attachment permit applications and take "other lawful remedial action."[47] Comcast, however, fed up by PacifiCorp's insatiable demands for cash, refused to pay any further penalties because it had already paid PacifiCorp over $5.4 million. By letter dated March 3, 2004, PacifiCorp notified Comcast that it would no longer process any pole attachment permit applications for Comcast, effective immediately.[48]

G. Comcast Petitioned the Commission For Emergency Relief

With total charges now exceeding $9.7 million and PacifiCorp refusing to allow Comcast any access to its poles, whether to put up new attachments, overlash existing attachments, or simply perform facility maintenance, Comcast was forced to petition the Commission for immediate relief. On March 23, 2004, Comcast filed a Motion for Immediate Relief and Declaratory Ruling seeking an Order from the Commission directing PacifiCorp to resume processing Comcast's permit applications and to allow Comcast access to its poles under fair and reasonable conditions.[49]

On April 6, 2004, the Commission held a hearing on the Motion. At the conclusion of the hearing, the Commission ordered PacifiCorp to resume permitting Comcast's pole attachment applications and specifically held that PacifiCorp could not condition timely processing of permit applications on Comcast's agreement to pay "unauthorized" pole attachment penalties.[50]

H. PacifiCorp Convened a Pole "Safety" Meeting for the First Time in February 2004

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47 *See* Letter from C. Fitz Gerald to P. O'Hare, dated 2-20-04, attached hereto as Exhibit 6.
48 *See* Letter from C. Fitz Gerald to P. O'Hare, dated 3-3-04, attached hereto as Exhibit 7.
49 *See* Motion for Immediate Relief and Declaratory Ruling.
50 *See* Order on Motion for Immediate Relief.

On February 5, 2004, while invoices for "unauthorized attachments" continued to come in, PacifiCorp held a meeting with a number of communications attachers with attachments on PacifiCorp's poles for the purpose of addressing purported safety violations.[51] At the meeting, PacifiCorp presented Comcast with a list of approximately 15,000 instances in which it said that Comcast was in violation of safety standards. It presented similar list to the other attachers and requested that each of them respond within 30 days with a plan for remedying all of the violations.[52] This came as a surprise to Comcast for a number of reasons.

First, this was the first formal violation notification Comcast personnel could ever recall receiving.[53] Second, a number of the items PacifiCorp presented were erroneously identified as violations and appeared to be based on a misapplication of the safety codes.[54] Others constituted only technical violations that PacifiCorp had never before considered to be "safety violations."[55] Third, Comcast did not cause many of violations PacifiCorp identified.[56] Fourth because Comcast did not have any business relationship, or more important, authority over other attachers on the poles, Comcast did not see how ***it*** could take responsibility for coordinating PacifiCorp's massive plant clean-up.[57] Finally, Comcast was surprised at this safety meeting to find, for the first time, that the audit was not limited to attachment accounting. Rather the audit was a full-blown safety audit.

I. Simultaneous Tariff 4 and Rulemaking Proceedings

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[51] *See* Bell Initial Testimony, pp. 10-12.
[52] *See* Bell Initial Testimony, pp. 10-12.
[53] *Id.*
[54] *Id. See also* Initial Testimony of Michael Harrelson, submitted July 2, 2004, pp. 42-44; Rebuttal Testimony of Michael Harrelson, submitted July 14, 2004, pp. 8-14.
[55] *See* Bell Initial Testimony, pp. 10-12; Bell Sur-rebuttal Testimony, pp. 5-7.
[56] *See* Bell Initial Testimony, pp. 9, 11; Harrelson Rebuttal Testimony, pp. 11-14.
[57] *See* Bell Initial Testimony, p. 11.

In a separate proceeding, the Commission has been considering amending PacifiCorp's pole rental rate tariff and implementing pole attachment regulations.[58] In that proceeding, PacifiCorp has unleashed its full arsenal against communications attachers. PacifiCorp requests a rental rate hike from $4.65 to approximately $30 for attachments used to provide telecommunications services.[59] As part of that docket, PacifiCorp submitted its standard pole attachment agreement to the Commission for use as a state-wide form.[60] Comcast vigorously objected to PacifiCorp's standard agreement as unduly prejudicial to attachers.

III. THE COMMISSION HAS CERTIFIED TO THE FCC THAT IT REGULATES POLE ATTACHMENTS IN ACCORDANCE WITH 47 U.S.C. § 224

This Commission's authority over pole attachments is derived from 47 U.S.C. § 224(c), which provides that the FCC has jurisdiction over the rates, terms and conditions of pole attachments *except* where an individual State certifies that it regulates the such matters. Utah has so certified.[61]

As a result, the Commission is charged with ensuring that terms and conditions of attachment are just and reasonable.[62] In addition, the Commission has broad authority to supervise and regulate every public utility within the state.[63] Accordingly, the Commission is not only bound to ensure that the rates, terms and conditions are just and reasonable,[64] but it is

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[58] *See In the Matter of An Investigation Into Pole Attachments*, Docket No. 04-999-03.

[59] *See* Telecommunications Attachment Rate Calculations, attached hereto as Exhibit 8.

[60] *See* Comcast's Comments to the Draft Proposed Rule and Contracts of the Division of Public Utilities, Docket No. 04-999-03.

[61] Utah Code § 54-4-13; *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982).

[62] *Id*.

[63] Utah Code § 54-4-1; *see also* Utah Code § 54-4-2.

[64] *See* Utah Code 54-4-13.

also bound by federal law to "consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services."[65]

IV. THE COMMISSION MUST DETERMINE WHAT IS "JUST AND REASONABLE" BY EVALUATING THE PURPOSE AND INTENT OF POLE ATTACHMENT LEGISLATION, INDUSTRY STANDARDS AND THE PARTIES' PRIOR COURSE OF CONDUCT

In order to discharge its statutory duties, this Commission must determine whether PacifiCorp's rates, terms and conditions of attachment are just and reasonable. However, since submitting its certification that it regulates pole attachments to the FCC, this Commission has had few opportunities to consider pole attachment disputes.[66] The Commission, however, need not "reinvent the wheel." The FCC has built its extensive body of law over the course of 26 years through literally hundreds of litigated cases and rulemakings that provides important guidance to resolution of this dispute. In fact, the FCC has considered situations functionally identical to this one.

In regulating rates, terms and conditions of attachment, the FCC's focuses on balancing three important principles: a) the purpose and intent of the Pole Attachment Act, b) standard industry practices, and c) the parties' prior course of dealing.[67] These same principles should govern the Commission's analysis of Comcast's Request For Agency Action.

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[65] 47 U.S.C. § 224(c)(2)(B). At the April 6, 2004 hearing on Comcast's Motion for Immediate Relief, Chairman Campbell acknowledged that "under the Utah code we have obligations as it relates to new technologies in telecommunications and so forth, and so certainly the Commission would be troubled if a utility was leveraging their debt collection against the delay in broadband plans…". *See* Hearing Transcript, April 6, 2004, p. 66, attached hereto as Exhibit 9.

[66] The Commission's recent rulemaking docket has been its first in-depth consideration of pole attachment terms and conditions, and indeed, it does not appear that there has been any significant regulatory activity with respect to pole attachments in almost 23 years. *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982). That fact was not lost on PacifiCorp when it decided to use Utah as a test run for its new policies.

[67] *See, e.g., Mile Hi Cable Partners, LP v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450 (Cab. Serv. Bur. 2000); *Cavalier Tel., LLC v. Virginia Electric & Power Co.*, 15 FCC Rcd. 9563 (Cab. Serv. Bur. 2000) (mandating that the utility facilitate CLEC's access to poles).

A. The Purpose and Intent of the Pole Attachment Act Was To End Utility Pole-Owners' Abuse Of Their Monopoly Control Over Essential Facilities

Pole attachment disputes are not unique to Utah. As discussed in greater detail below, the problems that PacifiCorp has generated are similar to those that have existed for decades and which prompted Congress to enact the Pole Attachment Act of 1978 ("Act") which is incorporated within the federal Communications Act found at Title 47 of the United States Code. A brief history of the Pole Attachment Act will help the Commission evaluate this case.

1. Utilities Have Monopoly Control Over Poles And Conduit

The Pole Attachment Act[68] was the legislative response to abuses such as "exorbitant rental fees and other unfair terms"[69] inflicted on cable operators by telephone and electric utilities. The United States Congress,[70] the Supreme Court,[71] federal district and circuit courts,[72] the Department of Justice[73] and the Federal Communications Commission ("FCC"),[74] have all recognized the status of poles and conduit as "essential facilities" and thus, bottlenecks

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[68] Pub. L. No. 95-234, 92 Stat. 35 (1978), codified at 47 U.S.C. § 224.

[69] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments, In the Matter of the Implementation of 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103 ¶ 21 (2001), *aff'd sub nom Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

[70] *See, e.g.*, 123 Cong. Rec. H35008 (1977) (statement of Rep. Broyhill, co-sponsor of the Pole Attachments Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, the cable operators are virtually dependent on the telephone and power companies. . . .").

[71] *See, e.g., National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 122 S. Ct. 782, 784 (2002) (finding that cable companies have "found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. . . . Utilities, in turn, have found it convenient to charge monopoly rents.").

[72] *See, e.g., United States v. Western Elec. Co., Inc*. 673 F. Supp. 525, 564 (D.D.C. 1987)(stating that cable television companies "depend on permission from the Regional Companies for attachment of their cables to the telephone companies' poles and the sharing of their conduit space. . . . In short, there does not exist any meaningful, large-scale alternative to the facilities of the local exchange networks. . . .").

[73] *See Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C. 2d 307, ¶ 23 (1970).

[74] *See Common Carrier Bureau Cautions Owners of Utility Poles*, 1995 FCC LEXIS 193, *1 (Jan. 11, 1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems."); *see also, Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C. 2d 307 ¶ 46 (1970) (recognizing that the telephone company has a monopoly and "effective control of the pole lines (and conduit space) required for the construction and operation of CATV systems.").

to facilities-based competition in telecommunications and cable television markets. In deliberations preceding passage of the 1978 Pole Attachment Act, Congress observed that "public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates."[75] Some pole and conduit owners have also maximized their leverage control over pole and conduit resources in order to protect their stranglehold over their core voice telephony business, and to facilitate their entry into the cable television and broadband communications markets.[76]

2. Utility Abuse of Poles And Conduits Led To The Pole Attachment Act

Reacting to this type of monopoly abuse, Congress passed the Pole Attachment Act in 1978,[77] and mandated that the FCC (or certified state agency) regulate pole and conduit attachments so that monopoly-owned facilities were available to cable operators at just and reasonable rates, terms and conditions[78] in order to promote competition.[79] The Commission is

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[75] H.R. Rep. No. 94-1-1630, at 5 (1976).

[76] *See, e.g.*, Letter from Richard Firestone, Chief of the Common Carrier Bureau to Mr. Butler, 5 FCC Rcd. 4547, 4548 (July 6, 1990) (discussing cross-ownership restrictions and stating that "[t]he restriction on telephone company provision of video programming originated with a determination by the Commission that the monopoly position of the local telephone company might enable it to engage in anticompetitive conduct toward independent cable operators, by denying access to pole and conduit controlled by it and/or subsidizing its cable television service from its regulated rate base. The Commission was concerned with the potential extension of the local telephone company's monopoly power to cable television and other services that could be provided by cable facilities. The Commission therefore barred telephone common carriers from providing 'cable television service' within their telephone service areas.'"); *see also Telephone Company Cable Television Cross-Ownership Rules*, Sections 63.54—63.58, 3 FCC Rcd. 5849 (1988) (finding that "continued regulatory oversight is required to ensure that carriers do not abuse their power to control access to poles and conduit or to engage in improper cost-shifting."); *In re: General Telephone Co. of Calif.*, 13 F.C.C. 2d 448, 463 (1968) (opining that by virtue of its control over poles, the telephone company is in a position to preclude an unaffiliated cable television system from commencing service).

[77] Pub. L. No. 95-234, 92 Stat. 35 (1978), codified at 47 U.S.C. § 224.

[78] *See* 47 U.S.C. § 224(b)(1); *Alabama Cable Telecomm Ass'n v. Alabama Power*, 15 FCC Rcd. 17346, ¶ 6 n.27 (2000) ("By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space," citing *FCC v. Florida Power Corp.* 480 U.S. 245 (1987)), *aff'd sub nom Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002).

also authorized to adopt procedures necessary to hear and to resolve complaints concerning rates, terms and conditions.[80]

The predominant legislative goal for Congress in enacting the Pole Attachment Act was "to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust and unreasonable pole attachment practices on the wider development of cable television service to the public."[81]

The Pole Attachment Act also sets forth a cost-based, rate-setting formula to determine whether the pole and conduit rates charged by utilities are just and reasonable.[82] States are allowed to opt out of the FCC's regulatory regime if they "certify" to the FCC that they effectively regulate "the rates, terms and conditions for pole attachments."[83] Utah has certified to the FCC that it regulates the rates, terms and conditions of pole attachments.[84]

The Telecommunications Act of 1996 ("1996 Act") expanded the FCC's jurisdiction over poles and conduit to cover telecommunications, in addition to cable attachments, so that providers of telecommunications services as well as cable operators would be entitled to "nondiscriminatory access" to utility poles and conduit at "just and reasonable" rates terms and

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(...continued)

[79] *See FCC v. Florida Power Corp*., 480 U.S. 245, 247 (1987) (finding that Congress enacted this legislation "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service."); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 1998 FCC LEXIS 140, **31 (Jan. 13, 1998)("Wireline video and telecommunications competition is heavily dependent on the ability of market participants to obtain access to utility poles, conduits and rights of way at reasonable rates.").

[80] 47 U.S.C. § 224(b)(1).

[81] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments, In the Matter of the Implementation of 703(e) of the Telecommunications Act of 1996,* Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶ 21 (2001), *aff'd sub nom Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002).

[82] 47 U.S.C. § 224(d)(1).

[83] 47 U.S.C. § 224(c). Eighteen states and the District of Columbia have provided the required certification. *See States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd. 1498 (1992).

[84] *See* Utah Code Ann. § 54-4-13; Utah Admin. Code § R746-345-1; *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982).

conditions.[85] In passing the 1996 Act, Congress hoped "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ."[86]

3. Utility Pole Attachments Today

Despite passage of the Pole Act and amendments, utility pole and conduit owners continue to resist state and federal attempts to curb their unreasonable conduct. Utility transgressions range from efforts to set rates at unlawful levels; [87] restrict the deployment of fiber-optic cable;[88] deny attachers access to poles;[89] and demand illegal (non-rental) charges.[90] PacifiCorp has visited each of these abuses on Utah in the last two years. Nevertheless, application of the Pole Attachment Act in each of these cases not only protected those operators that brought the complaint, but also communications competition overall. In the absence of effective pole attachment regulations, these communications attachers are at the mercy of the pole owners, to the detriment of facilities-based competition and choice for consumers.

B. Standard Industry Practices

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[85] 47 U.S.C. § 224 (a)(1)(4).

[86] Conf. Rep. on S. 652, 142 Cong. Rec. H. 1078 (Jan. 31, 1996).

[87] *See RCN Telecom Serv. of Philadelphia, Inc. v. PECO Energy Co. and Exelon Infrastructure Serv., Inc*. 17 FCC Rcd. 25238 (Enf. Bur. 2002) (rejecting PECO's attempt to charge a "market rate" of $47.25 per pole); *see also Alabama Power Co., v. FCC*, 311 F.3d 1357 (11th Cir. 2002) (affirming the FCC's decision to "reject the [$38.81 per pole] price demanded by" Alabama Power).

[88] *See Heritage Cablevision Assocs. of Dallas, L.P. et al. v. Texas Util. Elec. Co.*, 6 FCC Rcd. 7099 (1991), *recon. dismissed*, 7 FCC Rcd. 4192 (1992) (finding that utilities may not limit the types of services offered by a cable operator), *aff'd sub nom Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

[89] *See Cavalier Tel., LLC v. Virginia Electric & Power Co.*, 15 FCC Rcd. 9563 (2000), (mandating that the utility facilitate CLEC's access to poles). *Cavalier Telephone* continues to reflect the standards of justness and reasonableness to which the FCC holds utility pole owners.

[90] *See Texas Cable & Telecom. Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd. 9138, ¶ 10 (1999) (finding that attaching parties are required to pay "for the actual cost of necessary engineering survey expenses."); *Newport News Cablevision v. Virginia Elec. & Power Co.*, 7 FCC Rcd. 2610, ¶ 8 (1992) ("An underlying principle of Commission regulation of pole attachments . . . is that costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary.").

Standard industry practices have evolved over years of cable and utility pole owners working together. Many of these practices have emerged out of regulatory schemes, while others were formed out of field practices

A broad range of pole attachment permit procedures exist across the industry, ranging from oral approvals to formal written submissions. . Informal and oral permitting processes are not unusual. Although pole attachment agreements often attempt to add formality to the application process – and some formality certainly is appropriate – often field relationships govern the processes and otherwise supplement, or even replace formal procedures set forth in agreements, particularly after the initial system build-out (which in Utah was substantially completed in the 1980's).[91]

It is not at all unreasonable that parties did not follow the procedures established in their agreements.[92] During initial build-outs there were comparatively few attachers and plenty of room to make cable television attachments to utility poles without having to perform make-ready.[93] In these cases, utilities often granted oral permission to attach either in person or by telephone. To keep rental billing records accurate, the utilities periodically conducted audits. A "refreshed" number of poles with attachments would be identified, and the utility's billing systems would be updated.[94]

After the initial build-outs, there were far fewer attachment requests to process, so formalized procedures often were not necessary. It became the norm in the industry for local field-level employees to make informal arrangements with employees of the other companies to

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[91] Harrelson Initial Testimony, p. 15.

[92] *See* Sur-rebuttal Testimony of Michael Harrelson in Response to the July 26, 2004 Sur-rebuttal Testimony of Thomas Jackson, submitted Aug. 6, 2004, pp. 5-6.

[93] *Id.*; *see also* Deposition of John Cordova, dated May 21, 2004, p. 25, attached hereto as Exhibit 10.

[94] *Id.*

allow them to accomplish their daily line extensions, service drops and routine maintenance-type work. Furthermore, it is not unusual for local district supervisors or managers to be aware that cable operators are attaching to their poles without detailed permitting information. The only information many pole owners require is notice of where the construction crews are going to be and whether the crews need to move facilities (perform make-ready) to make room for the new cable attachments.[95]

Pole owners, for the most part, do not use audits as opportunities to catch wrong doing or to impose punitive measures. Rather, pole owners use audits to do periodic counts of attachments to the poles and to update their billing records.[96] This case, however, presents one of the most glaring exceptions.

C. Parties' Prior Course of Dealing

An understanding of the parties' long history together and the patterns and practices that evolved during this relationship is essential to understanding just how far PacifiCorp has deviated from industry norms. As described below, the parties have had a long-standing relationship based on trust and mutual respect. Although the testimony PacifiCorp filed in this case suggests that the parties have always been at odds, the truth is that these problems did not arise until PacifiCorp implemented its "unauthorized" attachment penalty program in January 2003. Indeed, the positive relationships among Comcast and PacifiCorp employees that flourished for years have only soured because of PacifiCorp's recent conduct.

1. Initial Cable Build in Utah

In the late 1970's Comcast's predecessor TCI began installing cable television facilities in Utah on a widespread basis. At that time, most cable facilities were aerial, installed

[95] *Id.* pp. 16-17.
[96] *Id.*

on utility poles. PacifiCorp's predecessor Utah Power owned the majority of these poles. It still does today.

Under agreements in place at that time, TCI obtained authorization to attach to the poles through a process very different from that imposed by PacifiCorp today. During the initial build, TCI arranged three-party walk-outs into the field with representatives of Utah Power and Qwest (then Mountain Bell and subsequently U S West).[97] The parties would take large maps out into the field (permitting maps) marked with each pole to which TCI sought to attach. During these field walk-outs, a representative from each of the three companies inspected each pole and came to an agreement on what make-ready, if any, was necessary. The parties marked make-ready notes on a copy of a map showing the location of the pole. These maps were copies of Utah Power's service maps with the cable route and make-ready marked on them.[98] TCI then kept a copy of the map and submitted one to Utah Power[99] with an application form, which was known as "Exhibit A" due to the fact that this form was attached to the pole attachment agreement as Exhibit A.[100]

The Exhibit A's were single page application forms used by communications attachers when applying to put up pole attachments. On the Exhibit A sheet, the party seeking to attach identified itself and cited the basis for its authority to attach, which was the pole attachment agreement. The attacher identified the poles for which it was applying by attaching the permitting maps to the Exhibit A.[101]

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[97] *See* Initial Testimony of Gary Goldstein, submitted July 2, 2004, p. 3.

[98] *See id.*

[99] The Exhibit A's and attached maps were submitted directly to Utah Power. Therefore, PacifiCorp should have record of each of these applications.

[100] *See id.* Examples of the Exhibit A's are attached to Gary Goldstein's Initial Testimony as Exhibit 1.

[101] *See id.*, pp. 3-4.

Unlike the process in place today, attachers did not submit applications for each individual pole and the applications did not include the mapstring, and point numbers, GPS numbers, street address and other that PacifiCorp now uses to identify each pole in its grid.[102] PacifiCorp's poles were not consistently tagged with numbers so TCI could not identify each individual pole by number or other identifier. [103]

After the communications companies submitted the Exhibit A's with attached maps, Utah Power would propose make-ready changes by returning a signed copy of the maps with make-ready requirements marked on them.[104] The cable operator then could either agree to pay for the make-ready or the changes by counter-signing the Exhibit A, or, if the changes were too costly, re-route the facilities to avoid the pole(s) in question.[105] This process remained in place throughout the late 1970's and 1980's.[106]

2. Relaxing the Standards for Pole Attachment Permitting

During the 1990's, however, the standards for obtaining pole attachment permits became somewhat more relaxed and informal. By this time, the vast majority of cable systems were already built, although some line extensions, and thus new pole attachments, were necessary to serve new customers.[107] By the mid-1990's, Utah Power no longer appeared interested in conducting joint permitting walkouts. Most new attachments were made on an oral grant of authority or other informal means.[108]

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[102] *See id.*, p. 4.
[103] *Id.*
[104] *Id.* at p. 5.
[105] *Id.*
[106] *See id.*, p. 6.
[107] *See* Bell Initial Testimony, p.3.
[108] *See* Bell Initial Testimony, p. 3; Initial Testimony of Mark Deffendall, pp.4-6, submitted July 2, 2004.

For example, in his testimony, Comcast's Mark Deffendall recounts that when he worked for Provo Cable he was not required to submit formal, detailed permit applications.[109] Mr. Deffendall, having previously worked in a highly structured and regulated permitting environment in California, prepared detailed applications for each pole to which he sought to attach and attempted to submit the applications to his district level permitting contact. Although the district level official accepted the applications, he simply set the stack aside and told Mr. Deffendall that as long as there was room on the poles, the operator was free to put up attachments. The district level official said that Provo Cable should just look up at the pole and, if there was room, attach. Mr. Deffendall did not receive any subsequent response to those applications.[110]

Other times, Comcast's predecessors obtained authorization by directing attachment requests to friends and family members working for PacifiCorp. They simply called a friend or family member at PacifiCorp and request permission to attach.[111]

Finally, in stark contrast to current requirements and in keeping with what was and still is the industry norm, PacifiCorp did not require applications for overlashing. If an attachment already existed, Comcast was free to overlash, so long as it did not overload the pole.[112] This too was and is the industry norm.[113]

3. Current Pole Attachment Policies

At about the time Comcast's predecessors began upgrading the cable system to provide advanced services in 1999 and 2000, PacifiCorp began to change its permitting

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[109] *See* Deffendall Initial Testimony, pp. 3-8.
[110] *Id.*
[111] *Id.* at 4-5.
[112] Bell Initial Testimony, pp. 4-5.
[113] *See* Harrelson Initial Testimony, pp. 23-24, 26.

practices. In 2000, Stanley Spencer, a Utah Power employee, met with Comcast's Rodney Bell to discuss the coordination of work between PacifiCorp and Comcast for Comcast's (then AT&T Broadband's) upgrade. At that meeting, Mr. Spencer informed Mr. Bell that Utah Power would start requiring Comcast to submit written applications for new attachments. He also told Mr. Bell that, at that point, PacifiCorp would not require applications for overlashing, but that Utah Power would begin requiring them at some point in the future.[114]

When PacifiCorp first imposed this new permit application, it required Comcast to submit all applications directly to Corey Fitz Gerald, in Portland, Oregon.[115] It appears that PacifiCorp only collected applications for billing purposes; nothing indicates that PacifiCorp conducted field inspections or analysis.[116] At that time, PacifiCorp did not charge application or inspection fees and never returned processed applications back to Comcast. If PacifiCorp approved, denied or threw away the applications, it never notified Comcast.[117]

From that point on, the application process became increasingly more detailed and complex. Each time the application process changed under Ms. Fitz Gerald's direction, Comcast made every attempt to comply with the changes imposed by PacifiCorp.[118] For example although PacifiCorp had previously not charged an application fee or inspection fees, in 2003, it began invoicing Comcast for inspection and application fees.[119] PacifiCorp now has a full schedule of fees and costs that it bills to Comcast.[120] Comcast pays these fees, even though the prior pole attachment agreement did not provide for them and PacifiCorp unilaterally imposed them.

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[114] Bell Initial Testimony, pp. 4-5.
[115] *Id.*, p. 6.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *See* Initial Testimony of Martin Pollock, pp. 9-10, submitted July 2, 2004.
[120] *See* PacifiCorp Fee Schedule, attached hereto as Exhibit 11; *see also* Fitz Gerald Dep. pp. 201-211.

Today's version of the pole attachment application is quite detailed and requires pole numbers, map string identification numbers, street addresses, and a description of the type of attachment.[121] After submitting this information, Comcast is often forced to wait 6-9 months or more for PacifiCorp to respond to its applications. Frequently, PacifiCorp fails to respond to request for pole attachment for more than a year after such applications are filed.[122]

For each pole—even simple overlashes—PacifiCorp inspectors go to the field and take a comprehensive inventory of all facilities on the poles, including electric facilities and facilities belonging to other communications attachers.[123] The worksheets the inspectors submit clearly show that PacifiCorp is using these inspections, that Comcast pays for, to collect information about its own electric facilities and other attachers. This includes information completely unrelated to Comcast's attachment requests, including PacifiCorp's and other attachers' violations that do not affect Comcast's ability to attach safely; other attacher's unauthorized attachments; and an electric facility inventory. The inspection is at least as detailed as the inspections Osmose is doing for PacifiCorp in connection with the 2002/2003 audit. Although PacifiCorp claims it collects all of this information—at Comcast's expense—to ensure that the overlashes do not overload PacifiCorp's poles,[124] PacifiCorp has stated that its inspectors are not trained to conduct loading calculations and that no such calculations have been made in connection with Comcast's applications.[125]

4. Prior Surveys and Audits

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[121] *See* Pollock Initial Testimony, p. 2; *see also* Fitz Gerald Initial Testimony, Ex. 1.1.
[122] Pollock Initial Testimony, p. 6.
[123] *See* Inspection Sheets, attached hereto as Exhibit 12.
[124] *See* Fitz Gerald Initial Testimony, pp. 23-24
[125] *See* Deposition of Joseph Clifton, taken May 21, 2004, p. 85, attached hereto as Exhibit 13.

Prior to 2002, when Ms. Fitz Gerald consolidated PacifiCorp's joint use program in Portland, PacifiCorp's joint use management was largely de-centralized and to the extent that it was managed at all, was managed at the district level.[126] District level employees accepted and processed applications—written or oral—and rental bills were generated based on district-level records. Periodically, district level staff would survey the poles—but these initiatives would be limited to taking a count of attachments for billing purposes.[127] No unauthorized attachment penalties were assessed in connection with prior surveys.[128]

In the mid-1990's, PacifiCorp attempted to centralize PacifiCorp's attachment records by creating standard contracts and processes for pole attachment applications and consolidating joint use in its Portland, Oregon headquarters.[129] However, this initiative had limited success. As discussed above, until 2000, PacifiCorp field employees in Utah continued to operate under the informal processes that had existed for a number of years.

In addition, PacifiCorp apparently became concerned that its joint use records were incomplete,[130] and commissioned a survey in 1997-1999 in which it "did not attempt to identify the number of attachments owned by each communications entity" but was "limited to determining which communications companies were attached to PacifiCorp owned poles."[131] Comcast had no knowledge of this audit until this litigation when PacifiCorp first mentioned it in

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126 *See* Fitz Gerald Initial Testimony, p. 25; Exhibit 5, pp. 56-57.
127 *See* Exhibit 5, pp. 57-59.
128 *See, e.g.*, Fitz Gerald Initial Testimony, p. 17.
129 *See* Fitz Gerald Initial Testimony, p. 13.
130 *See* Fitz Gerald Rebuttal Testimony, p. 13.
131 *See* Exhibit 4, Response No. 15, p. 23.

response to a Comcast data request.[132] Furthermore, PacifiCorp is unable to produce any contemporaneous documentation of the results.[133]

Although the scope of the 1997/1999 Audit was limited, PacifiCorp has escalated it to a key role in this case. It now claims that this survey is the "base line" for the disputed 2003 Audit.[134] In particular, PacifiCorp claims that Comcast has attached to 35,000 new poles in the four or five years since this 1997/1999 Audit was completed.[135] That simply has not happened.

V. PACIFICORP'S $250 UNAUTHORIZED ATTACHMENT PENALTY IS UNJUST AND UNREASONABLE

Comcast adamantly denies both the reasonableness of the $250 penalty and that of PacifiCorp's assertions that Comcast has attached 35,000 new pole attachments since the 1997/1999 Audit. The Commission should consider the following important factors in ruling on the PacifiCorp's penalty regime:

First, the FCC, which has over 25 years experience in adjudicating pole attachment complaints has previously declared the $250 penalty to be unlawful. This ruling applies to all 32 states where the FCC has jurisdiction over pole attachments. Comcast urges this Commission to consider the FCC's decision and that agency's long-developed regulatory experience in considering this exact same issue.[136] Second, the $250 penalty bears no relation to any costs PacifiCorp incurs with respect to Comcast's attachments. Comcast is separately liable to PacifiCorp for any administrative, make-ready or safety related costs attributable to Comcast's

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[132] *See* Rebuttal Testimony of Gary Goldstein, submitted July 14, 2004, p. 1; Bell Rebuttal Testimony, p. 1; *see also* Exhibit 4, Response No. 14, p. 22.

[133] *See* Exhibit 4, Response No. 15, p. 23. The only evidence PacifiCorp produced was a copy of a form letter, unsigned that may or may not have been sent to Comcast's predecessors. PacifiCorp only just produced this document in its sur-rebuttal testimony dated July 26, 2004, even though Comcast submitted a discovery request for this on April 2, 2004.

[134] *See* Fitz Gerald Rebuttal Testimony, pp. 11-12.

[135] *See* Fitz Gerald Initial Testimony, p. 31.

[136] *See Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450 (Cab. Serv. Bur. 2000).

attachments. Third, since the penalty bears no relation to actual costs, it is by definition punitive and contrary to Utah state law. Fourth, to uphold the penalty, the Commission would have to accept PacifiCorp's tortured and incredible explanation of the penalty. This explanation has required PacifiCorp – among other things – to try to resuscitate the contract that it summarily terminated at the end of 2001. The real source of the $250 penalty is highly controversial regulations from PacifiCorp's home state of Oregon. Fifth, and finally, PacifiCorp's claim that it must impose the penalty to deter unauthorized attachments has no basis in fact or law.

A. The $250 Unauthorized Attachment Penalty Is Illegal In 32 States.

In *Mile Hi Cable Partners v. Pub. Serv. Co. of Colo,* the Federal Communications Commission ("FCC") held that the ***exact*** $250 per pole penalty that PacifiCorp has imposed on Comcast is illegal because it is unjust and unreasonable.[137] Because the FCC regulates the rates, terms and conditions of pole attachment in 32 states, including Utah's neighboring states of Colorado, Nevada, New Mexico, Arizona, and Wyoming, the $250 per attachment penalty for unauthorized pole attachments is now illegal in 32 states. Further, in reaching this decision, the FCC concluded that a $50 penalty--$10 *less* than the penalty specified in the 1999 Agreement—is also unjust and unreasonable.[138]

The facts and holding of *Mile Hi* alone strongly support an order by this Commission holding that both the $250 penalty imposed by PacifiCorp, as well as the $60 penalty provision in the parties' cancelled contract, are unjust and unreasonable. [139]

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[137] 15 FCC Rcd. 11450, ¶ 14 (Cab. Serv. Bur. 2000), *aff'd Pub. Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

[138] 15 FCC Rcd. 11450, ¶ 14.

[139] Although the FCC's opinion in Mile Hi is not binding on this Commission, the FCC's holding is the result of analyzing the same rules and regulations of federal law that apply to this Commission and to pole attachments in Utah. The FCC's opinions on these issues are persuasive authority regarding the regulation of pole attachments.

1. A $250 Unauthorized Attachment Penalty is Unjust and Unreasonable Regardless of Whether it is Set Forth by Contract

The facts of *Mile Hi* bear a striking resemblance to this case currently before the Commission. In that case, the respondent audited its plant in an effort to identify unauthorized pole attachments belonging to Comcast's predecessor in Colorado: Mile Hi Cable Partners. The respondent's contractor identified over alleged 25,000 unauthorized attachments. Relying on the $250 unauthorized attachment penalty provision that the utility had imposed in a recently renegotiated imposed agreement, the utility charged Mile Hi nearly $6 million dollars in unauthorized pole attachment penalties at the rate of $250 per pole.[140]

The FCC deleted the penalty and held – based on Congress' intent in enacting the Pole Attachment Act, and based simply on the terms of the Act – that "[t]he terms and conditions of pole attachment agreements and the practices implementing pole attachment agreements, including penalties for unauthorized attachments, must be just and reasonable."[141] Applying that standard, the FCC held that "unauthorized attachment penalties in the amount of $50 and $250 are UNREASONABLE." Thus, not only is the $250 penalty unlawful in 32 states, but a $50 penalty is as well.[142]

The FCC likewise disposed of arguments made by the respondent, and by PacifiCorp in the current case, that attachers "enjoyed benefits" from unpermitted attachments beyond rent avoidance. Is so doing, the FCC held:

> The only benefit to Complainant of failure to make application for attachment is the annual fee that it would not pay due to Respondent's ignorance of the particular attachment. An unauthorized attachment provides no benefit to Complainant with regard to safety. Complainant is under the same obligation to

[140] *Id.* at ¶ 4.
[141] *Id.* at ¶ 10.
[142] *Id.*, ¶ 22 (emphasis original).

> make its attachments safely and incurs the same liability for any safety violations for unauthorized attachments as it does for authorized ones. Any compromise to the integrity of the pole jeopardizes Complainant's installation and service as it does that of Respondent.[143]

The FCC further held that "because Complainant must always comply with safety concerns, there is no cost avoided by Complainant related to safety issues,"[144] so supposed safety concerns do not warrant the imposition of excessive penalty charges in the amounts of either $50 or $250.[145]

Ultimately, the FCC found that "a reasonable penalty for unauthorized attachments will not exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest…"[146] The FCC held, furthermore, that "[t]his penalty will provide incentive for [cable companies] to comply with a reasonable applications process while encouraging utilities not to delay audits of unauthorized attachments."[147] In balancing the interests of the parties, the FCC held that this calculation would be just and reasonable for all involved.[148] The FCC's Bureau-level decision was upheld by the full Commission and by the United States Court of Appeals.[149]

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[143] 15 FCC Rcd. 11450, ¶ 12.

[144] *Id.*, ¶ 13.

[145] *Id.* In affirming the opinion of the FCC, the United States Court of Appeals for District of Columbia held that "TCI's exclusive liability for hazards related to its attachments, and the detrimental effect that unsafe attachments would have on its own services, offer adequate incentives to heed the pertinent safety codes." *Public Serv. Co. v. FCC*, 328 F.3d 675, 680 (D.C. Cir. 2003).

[146] 15 FCC Rcd. 11450, ¶ 14.

[147] *Id.*

[148] In affirming this decision on review, the FCC held that "[i]n determining a just and reasonable fee, we must balance the need to provide an effective remedy with the need to encourage utilities not to delay audits of unauthorized attachments. We believe that a fee equal to five times the annual rent strikes the necessary balance under these circumstances." *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 17 FCC Rcd 6268, ¶ 9 (2002).

[149] *See Mile Hi Cable Partners, L.P. v. Public Service Co. of Colorado*, 17 FCC Rcd 6268 (2002); *Pub. Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

Under the *Mile Hi* five-year back rent standard that this Commission should adopt here, PacifiCorp should be allowed to charge Comcast a maximum of $23.25 per reasonably documented unauthorized attachment. That amount, equal to five years of back rent at the current rate of $4.65 per pole, would fully compensate PacifiCorp and ensure that Comcast receives no benefit from installing unpermitted attachments (to the extent that PacifiCorp has accurately identified unauthorized attachments). Based on PacifiCorp's claim, which Comcast denies, that Comcast has 35,439 unauthorized attachments,[150] PacifiCorp would be entitled to a maximum penalty of approximately $824,000. However, PacifiCorp has demanded more than ten times that amount. This Commission should reject PacifiCorp's attempt to collect these excessive penalties.

2. PacifiCorp Should Not be Permitted to Charge Comcast for Unauthorized Attachments that Were Not Installed by Comcast.

As indicated, the full FCC reviewed the above cited Cable Bureau's *Mile Hi* opinion and affirmed the order given.[151] In so doing, the FCC specifically held that "it would be unreasonable to subject Complainant to unauthorized attachment fees for essentially the 10 years prior to it even owning and controlling the attachments in question, particularly where as here Respondent itself did not conduct systemic surveys of its poles."[152] PacifiCorp, likewise "did not conduct systemic surveys of its poles." The same circumstances should prevent PacifiCorp from collecting unwarranted, unjust and unreasonable penalties in the current case.

Comcast did not acquire its Utah cable systems until 2002. Prior to that time, Comcast had no ownership or control of the systems currently at issue. Comcast should not be made responsible for the actions of its predecessors. Moreover, for nearly the entire time

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150 Fitz Gerald Initial Testimony, p. 31.
151 *See Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 17 FCC Rcd 6268 (2002).
152 *Id.*, ¶ 9.

Comcast has owned the Utah systems, no contract has been in place. Comcast should not be blamed for PacifiCorp's outdated and deficient record keeping, which has ranged from the non-existent to the deeply flawed.[153]

B. The $250 penalty is not cost-based

In addition to other reasons, PacifiCorp's $250 unauthorized attachment penalty is unreasonable because it bears absolutely no relationship to any costs PacifiCorp incurs. Despite having filed volumes of testimony, PacifiCorp offers no evidence that the $250 contains any actual cost components. Every cost element PacifiCorp discusses in its testimony—administrative costs,[154] audit costs,[155] inspection costs,[156] rental costs,[157] and of course make-ready—is recovered separately. Indeed, it appears that PacifiCorp misses no chance to manufacture (or in PacifiCorp's careful word choice "recover") additional costs.

Prevailing industry practices and long-standing FCC precedent unequivocally limit utilities to charging attachers for actual costs incurred. Any charges in excess of actual costs constitute over-recoveries and are expressly prohibited.[158] With the exception of back rent due on legitimate unauthorized attachments, the application of the $250 penalty—or even a $60 penalty—is an unreasonable windfall for PacifiCorp.

In fact, PacifiCorp's only reference to cost was during the April 6 hearing when PacifiCorp attempted to explain the $250 penalty. PacifiCorp stated that the penalty consisted of

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[153] Although PacifiCorp claims to have undertaken a 1997/1998 Audit, which they claimed served as the baseline for identifying "unauthorized" attachments, PacifiCorp has failed and refused to produce to Comcast any documents reflecting the results, or even the existence, of such an audit.

[154] *See* Fitz Gerald Sur-rebuttal Testimony, p. 16.

[155] *See* Fitz Gerald Initial Testimony, p. 40.

[156] *See* PacifiCorp Fee Schedule, attached hereto as Exhibit 11; *see also* Fitz Gerald Dep. pp. 201-211.

[157] *See* Fitz Gerald Initial Testimony, p. 12.

[158] *See Cavalier Telephone*, 15 FCC Rcd. 9563, ¶ 22; *Texas Cable & Telecomm. Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd. 9138, ¶ 10 (Cab. Serv. Bur. 1999); *Texas Cable & Telecomm. Ass'n v. GTE Southwest, Inc.*, 14 FCC Rcd. 2975, ¶¶ 32- 33 (Cab. Serv. Bur. 1999); *Newport News Cablevision, Ltd v. Virginia Elec. & Power Co.*, 7 FCC Rcd. 2610, ¶ 13 (Comm. Car. Bur 1992).

an average of 4 years' worth of $60 penalties plus "an additional component of approximately $10 in back rental charges."[159] PacifiCorp has since changed its explanation of the penalty. PacifiCorp's most recent explanation of the penalty is that PacifiCorp "determined that a charge of $60.00 per pole per year was applicable in addition to five years back rent at a rate of $4.65 per year" for a grand total of $323.25 per attachment. PacifiCorp then explained that it reduced the penalty to $250 per attachment because it believed that Comcast had consented to the $250 charge in Oregon.[160] The penalty has no relation to the costs associated with Comcast's attachments and, therefore, is unreasonable.

C. PacifiCorp's Penalty is an Illegal Liquidated Damages Charge Under Utah Law.

Under Utah state law, the $250 penalty constitutes liquidated damages and is unlawful. The Utah Supreme Court "has long had a policy against the imposition of liquidated damages that constitute a penalty for breach of a contractual agreement."[161] Based on this policy alone, and apart from any specific reference to prevailing pole attachment specific law, *see e.g.*, *Mile-Hi*, PacifiCorp's attempt to impose the penalty should be denied.

In determining the validity of a liquidated damages provision the Utah Supreme Court has adopted the following test, set forth in Restatement of Contracts § 339:

> (1) [A]n agreement, made in advance of breach fixing the damages therefore, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless,
>
> (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

[159] Exhibit 9, p. 46.
[160] Fitz Gerald Initial Testimony, pp. 32-33.
[161] *Woodhaven Apartments v. Washington*, 942 P.2d 918, 920 (Utah 1997).

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.[162]

Further, to be enforceable, "a liquidated damages provision must not be a product of unfairness resulting from disparate bargaining positions, a lack of access to pertinent information, or anomalies in the bargaining process, such as those posed by monopolies, duress, or contracts of adhesion."[163] Each of these factors weighs in favor of Comcast's argument that PacifiCorp's $250 liquidated damages charge is unenforceable.

1. Pursuant to the Restatement's Rule, PacifiCorp's Charge Must Be "A Reasonable Forecast of Just Compensation for the Harm That is Caused by the Breach."

As stated by the FCC in *Mile Hi*, the only benefit to the attacher, and therefore, the only loss to the pole owner, is the annual rent that is not paid when a pole owner is ignorant of an attachment.[164] Therefore, the total harm caused by any breach in this case is equal to $4.65 per pole per year. In order for PacifiCorp's $250 penalty to be proper then, PacifiCorp would have to assume that each of Comcast's "unauthorized" attachments has been in place for more than 53 years. This is obviously not the case.

2. Under the Restatement, the Harm Experienced by PacifiCorp Must Be Incapable of Estimation.

Any harm experienced by PacifiCorp can be accurately calculated. As already explained, PacifiCorp's damages are easily calculated as $4.65 per pole per year. Under the formula given by the FCC in *Mile Hi*, PacifiCorp would only be entitled to a maximum of $23.25 per pole, if the attachments to those poles are, in fact, unauthorized.

3. Utah Courts Have Specifically Held That a Liquidated Damages Clause, Such as the One in the 1999 Agreement, is Unenforceable

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[162] *Reliance Ins. Co. v. Utah Dept. of Transportation*, 858 P.2d 1363, 1367 (Utah 1993).
[163] *Robbins v. Finlay*, 645 P.2d 623, 626 (Utah 1982).
[164] 15 FCC Rcd. 11450, ¶ 12.

When it is the Product of Unequal Bargaining Positions or the Result of Monopoly Power.

PacifiCorp has a monopoly over essential pole facilities. PacifiCorp is using that monopoly power to extract unreasonable charges—and other concessions—for access to essential facilities.[165] Utah courts have explained that "[w]here…the amount of liquidated damages bears no reasonable relationship to the actual damage or is so grossly excessive as to be entirely disproportionate to any possible loss that might have been contemplated that it shocks the conscience, the stipulation will not be enforced."[166] The PacifiCorp penalty is completely unrelated to costs associated with rent, permit processing, make-ready or any other legitimate PacifiCorp cost. All of these costs are recovered separately. Likewise, these penalties bear no reasonable relationship to any damage PacifiCorp has suffered as a result of the attachment of unauthorized facilities to its distribution poles. However, PacifiCorp, as the monopoly owner of essential facilities, knows that Comcast has little choice but to attach to PacifiCorp's poles in order both to build new plant to serve new customers and to upgrade existing facilities. By literally holding Comcast's plant and services deployment hostage, PacifiCorp is leveraging its monopoly ownership of the poles to force Comcast to pay millions of dollars in penalties.

The Commission should reject PacifiCorp's attempts to charge Comcast a $250 liquidated damages penalty because: (1) such a penalty far overcompensates PacifiCorp for any damages it has suffered as a result of unauthorized pole attachments, (2) any damages PacifiCorp has suffered are easily calculable, and (3) PacifiCorp should be prevented from using its unequal monopoly bargaining power to enforce excessive penalty charges.

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[165] It is undisputed that PacifiCorp's poles are "essential facilities." *See* Section V.A., *supra*; Fitz Gerald Rebuttal Testimony, p. 22.

[166] *Woodhaven Apartments v. Washington*, 942 P.2d at 921 (quoting *Allen v. Kingdon*, 723 P.2d 394 (Utah 1986).

D. The $250 Penalty is Not Derived From the 1999 Pole Attachment Agreement

PacifiCorp's argument that it has a contractual basis for charging the $250 penalty is outright wrong. The argument must fail for three principal reasons: (1) the penalty does not appear in the (terminated) 1999 agreement (2) the Commission has the authority to determine whether the penalty is just and reasonable regardless of whether it is specified in a contract; and (3) neither the penalty nor the agreement was the result of arms' length negotiations.

1. The 1999 Agreement Does not Provide for a $250 penalty

The $250 penalty does not appear in any agreement governing the parties' pole attachments in Utah. The expired 1999 agreement provided:

> Should Licensee attach Equipment to Licensor's poles without obtaining prior authorization from Licensor in accordance with the terms of this Agreement, or should Licensee fail to remove its Equipment from Licensor's poles when requested to do so in accordance with the terms of this Agreement, Licensor may, as an additional remedy and without waiving its right to remove such unauthorized Equipment from its poles, assess Licensee an unauthorized attachment charge in the amount of $60.00 per pole per year until said unauthorized Equipment has been removed from Licensor's poles or until such time that Licensee obtains proper authorization for attachment.[167]

A plain reading of this provision indicates that the $60 penalty applies *prospectively*, not retroactively as PacifiCorp claims.

The Commission need only look to PacifiCorp's explanation of how it came up with $250 to see that the basis for the penalty is outside the parameters of the agreement—and any standard of reasonableness. For example, at the April 6, 2004 hearing, PacifiCorp's explanation of the penalty was basically that $250 is *close* to a $60 per year unauthorized attachment fee, *assuming* that Comcast was *probably* on the poles for *approximately* 4-5

[167] 1999 Agreement, p. 6.

years.[168] Then later, in its pre-filed testimony, PacifiCorp explained again that the $250 is an approximation of a $60 per year penalty, rounded down to be consistent with the penalty in effect in Oregon.[169]

The truth of how PacifiCorp derived this penalty amount and how this controversy landed before this Commission is far simpler than PacifiCorp's explanations. Both the $250 unauthorized attachment penalty, and the as-yet-unspecified penalty for supposed NESC or "safety" violations were hatched in Oregon in 1999. In the five years since their adoption the penalties have been the source of incessant friction and turmoil between electric pole owners and communications attachers in that state. These penalties were the result of what was essentially a compromise among cable operators who were seeking to reduce the pole attachment rentals that they paid annually to pole owners and certain Oregon Public Utility Commission staffers and pole owners who perceived a need to address distribution plant safety-related issues.[170] The friction between pole owners and communications companies resulted from the simple fact that the 1999 Oregon regulations did not act as any kind of a check on pole owners' ability to abuse their monopoly pole ownership, but as an enhancement to that power.

The interests of cable television companies were represented by the industry's state trade association, but Comcast did not participate in those negotiations. Indeed, Comcast did not begin to operate cable systems in that state for at least three years *after* the compromise was reached and inserted into the Oregon administrative regulations.

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[168] Hearing Transcript, p. 46.

[169] Fitz Gerald Initial Testimony, pp. 32-33.

[170] *See* OAR 860-028-150(1)(a)-(b); *see also* Charter Communications' Comments, Inc. to "*The Battle for the Utility Pole and the End-Use Customer," A PUC Staff Report*, submitted Feb. 27, 2004; *Qwest v. Public Util. Comm'n & PacifiCorp*, Amicus Curiae Brief of Charter Communications, Inc., June 2004. (attached hereto as Exhibits 15 and 16).

The Oregon regulations are the subject of four active pieces of contested litigation. Two are at the Oregon Public Utility Commission: *Central Lincoln People's Utility District v. Verizon Northwest Inc.*,, UM 1087, Petition for Removal of Attachments, (filed May 22, 2003), and *Portland General Elec. Co. v. Verizon Northwest Inc.*, UM 1096, Petition for Relief, (filed July 15, 2003). One is at the United States District Court for the District of Oregon: *Verizon Northwest v. Portland General Elec. Co*., Civ. No. 03-1286-MO, filed Sept. 17, 2003 (D. Or.).[171] Finally, one is before the Oregon Court of Appeals: *Qwest Corporation v. Public Utility Commission of Oregon*, Petition for Review of Rules Pursuant to ORS 183.400(1), CA A123511, (filed Jan. 12, 2004). The last of these judicial proceedings is a direct challenge brought by Qwest to the Oregon PUC and the $250 unauthorized attachment and safety penalties (and other penalty rules). PacifiCorp has intervened in support of the regulations and its brief in the case is due on or about the day that this matter is set for hearing.

Even though PacifiCorp canceled its agreement effective December 31, 2002, and even though there is no replacement agreement in place today, PacifiCorp has attempted to resuscitate that agreement for the purposes of finding something—anything—other than its experience in Oregon to justify the penalty. The Commission should not be misled. The reason that the $250 penalty is at issue at all here in Utah is because it came from Oregon, PacifiCorp's home state. Moreover, it is not difficult to see why PacifiCorp selected Utah as the proving ground for its $250 penalty. Until Comcast initiated this matter and until PacifiCorp sought to raise annual rental rates for communications companies by more than 500% (from $4.65 to

[171] The District Court suit was stayed pending resolution of the Oregon PUC case between the parties. *Verizon Northwest Inc. v. Portland General Electric Co*. 2004 WL 97615 (D. Or. 2004).

nearly $30.00 per pole),[172] there had been virtually no pole-attachment related activity at this Commission almost since Utah certified nearly 23 years ago to the FCC that it would ensure that the rates, terms and conditions of pole attachments would be just and reasonable.

When PacifiCorp chose Utah, there was only a very general pole attachments statute,[173] a very general administrative regulation,[174] and one judicial decision affirming the validity of this Commission's FCC certification at the time.[175] PacifiCorp did not seem concerned that the *exact* $250 fee implemented in *exactly* the same way that PacifiCorp did *is patently unlawful in 32 states*.[176] In fact, there was no shred of support for imposing this penalty in Utah, legal or otherwise for its penalty. Unlike the circumstances in Oregon, where there is a rule (albeit ill conceived) on which to base the penalty, or in the *Mile Hi* case where there was an explicit contractual provision, here in Utah, there is no basis for the penalty. To the contrary, as shown in Section V.C. of this brief, the penalties are liquidated damages which are patently and affirmatively illegal under Utah common law. PacifiCorp's only basis for imposing this penalty is the leverage it has over its essential pole facilities.

In sum, the $250 unauthorized attachment penalty and the upcoming safety violation penalty arose out of a highly controversial regulatory scheme in Oregon that has no place in Utah. PacifiCorp should be ordered immediately to refund the entire amounts paid to PacifiCorp in connection with this audit, together with the other appropriate relief.

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[172] *See In the Matter of An Investigation into Pole Attachments*, Docket No. 04-999-03; Telecommunications Pole Attachment Rates (Ex. 8).

[173] *See* Utah Code 54-4-13.

[174] Utah Administrative Code R746-345-1.

[175] *Utah Cable Television Operators Ass'n v. Public Serv. Comm'n of Utah*, 656 P.2d 398, 403 (Utah 1982).

[176] *See Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450; *States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd. 1498 (1992).

2. The Commission Must Determine Whether the $250 penalty is Just and Reasonable.

Even if the agreement still had legal effect, the Commission's authority over this matter is *not* limited to examining the four corners of the 1999 Agreement. Rather, the Commission is charged with both determining whether PacifiCorp's enforcement of the penalty provision are just and reasonable *as well as* determining whether the provisions themselves are just and reasonable.[177] As a result, even if PacifiCorp could claim that the penalty has some legitimate basis in the agreement that it terminated, the Commission is nonetheless empowered to determine independently whether the penalty is just and reasonable.[178]

The legislative history to Section 224, the statute under which both the FCC and this Commission derive their jurisdiction over pole attachments, demonstrates that Congress intended for the FCC to review and consider the parties' relationship and industry norms, stating that the enforcing agencies are to judge the fairness of a rate, term or condition "in relation to other contract provisions, prevailing practices of the industries involved, and the particular pole rate charges."[179] Congress never envisioned that pole attachment regulation would rely on strict contractual interpretations.[180] Particularly where, as here, the contractual term in question is not clear from the face of the agreement, the Commission should focus its inquiry on whether the utility's conduct pursuant to the agreement is just and reasonable.

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[177] Utah Code § 54-4-13.

[178] *Id*.

[179] S. REP. NO. 95-580, at 21 (1977); *see also Alert Cable TV of North Carolina, Inc. v. Carolina Power and Light Co.*, 1985 FCC LEXIS 3679 at ¶ 5 (Com. Car. Bur. 1985) (relying on same legislative history contemplating consideration of "prevailing practices"); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 F.C.C.2d 1585 at ¶ 13 (1978) (quoting Senate Report).

[180] Congress declared that "the open standard of 'just and reasonable' is at the same time sufficiently precise and flexible to permit the Commission to make determinations *when presented with specific contractual provisions* alleged to be excessively onerous or unfair." S. Rep. No. 95-580 (1977), *reprinted in* 1978 U.S.C.C.A.N. at 129 (emphasis added).

3. Congress and the FCC Have Long-Recognized That Pole Attachment Agreements are Contracts of Adhesion

Even if there an operative agreement existed here, PacifiCorp's claim that the agreement, and in fact the $250 penalty, were the result of arms-length negotiations between sophisticated parties[181] ignores the very important fact that PacifiCorp holds all the bargaining leverage in the parties' relationship. Pole attachment agreements have long been considered contracts of adhesion.[182] Indeed, the FCC recognizes that utility pole owners are well-positioned to use pole attachment agreements to defeat the pro-competitive intent of the Pole Attachment Act and to perpetuate the utility's stronghold over their monopoly pole assets.

For example, in rulemaking proceedings implementing the pole attachment provisions of the 1996 Act, the FCC considered and rejected utility arguments such as those raised by PacifiCorp that negotiated agreements are "inviolate," even if they conflict with the 1996 Act's amendments.[183] Indeed, the FCC affirmed its authority to invalidate unjust and unreasonable rates, terms and conditions of such agreements because utilities' monopoly control over pole and conduit facilities had not changed. Utilities possess the same control and have just as great an incentive in the post-1996 Act regime to charge excessive and/or discriminatory pole and conduit rents[184]--a conclusion that has been affirmed by the U.S. Supreme Court as well as numerous federal Courts of Appeals.[185] Some (including PacifiCorp) pursue those goals with

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[181] Response,¶ 1.

[182] *See, e.g., Selkirk Communications, Inc. v. Florida Power & Light Co.*, 8 FCC Rcd. 387, ¶ 17 (1993) (stating "[d]ue to the inherently superior bargaining position of the utility over the [attaching party] in negotiating the rates, terms and conditions for pole attachments, pole attachment rates cannot be held reasonable simply because they have been agreed to by a cable company").

[183] *See In re Amendment of the Commission Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶¶ 12-14 (2001).

[184] *See id.*

[185] *See, e.g., National Cable Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 122 S. Ct. 782, 784 (2002) (finding that cable companies have "found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. . . . Utilities, in turn, have found it convenient to charge monopoly rents."); *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (finding that Congress enacted the Pole Attachment (continued...)

abandon. However, the FCC has repeatedly held that "where onerous terms or conditions are found to exist on the basis of the evidence, [an attacher] may be entitled to a rate adjustment or the term or condition may be invalidated."[186]

In sum, PacifiCorp cannot hide behind the terminated 1999 Agreement. Regardless of what terms Comcast (or its predecessor) were forced to accept as a result of its unequal bargaining power, the Commission is ultimately charged with ensuring that the terms and conditions of joint use are just and reasonable. The $250 penalty, whether in the agreement or not simply is not just or reasonable.

E. PacifiCorp Imposed the $250 to Generate Revenue to Finance its Pole Inspection Process

PacifiCorp embarked on its $250 unauthorized penalty initiative against Comcast to generate revenue to pay for PacifiCorp's multi-state. Specifically, the record shows that the approximate total contract amount between PacifiCorp and Osmose is approximately $10 million.[187] The record also shows that to date, Comcast has paid $5.4 million in penalties, charges putatively associated with Osmose's conduct of the audit.[188] The amounts that Comcast

(...continued)
Act "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service."). *See also Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362-63 (11th Cir. 2002) (noting "'essential facilities' doctrine" and detailing Section 224's mandatory access provision to enable use of utility pole networks needed by cable operators); *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) (cable operators have "little choice but to" attach to utility poles); Common Carrier Bureau Cautions Owners of Utility Poles, 1995 FCC LEXIS 193, *1 (Jan. 11, 1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems.").

[186] *See Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 17 FCC Rcd. 19859, ¶ 2 (2002), *aff'd sub nom. Georgia Power Co. v. Teleport Communications Atlanta, Inc*., 346 F.3d 1033 (11th Cir. 2003). *See also Alabama Cable Telecommunications Ass'n v. Alabama Power Co*., 16 FCC Rcd. 12209, *aff'd sub nom. Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *WB Cable Assocs. Ltd v. Florida Power & Light Co*., 8 FCC Rcd. 383, ¶ 17 (Comm. Car. Bur. 1993); *Selkirk Communications, Inc. v. Florida Power & Light Co.*, 8 FCC Rcd. 387, ¶ 17 (Comm. Car. Bur. 1993); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration,* 4 FCC Rcd. 468 at ¶ 25 (1989).

[187] *See* Exhibit 4, Response No. 7, p. 12.

[188] *See* Nadalin Initial Testimony, p. 7.

has actually paid, or which PacifiCorp expected Comcast to pay compared to the amounts that PacifiCorp has committed to pay Osmose under the contract are more than coincidence.

First, PacifiCorp has claimed that it has discovered approximately 35,000 unauthorized Comcast attachments on its poles.[189] Applying the $250 unauthorized attachment penalty to that figure, Comcast would "owe" PacifiCorp about $8.75 million in penalties. PacifiCorp has also claimed the right to charge Comcast $13.25 for supposed Osmose charges related to the audit for each Comcast attachments.[190] Current invoices reveal that Comcast has about 105,000 attachments on PacifiCorp poles. Applying the $13.25 charge to those 105,000 poles Comcast would be liable for $1,391,250 for Osmose expenses. Add the total unauthorized attachment charges ($8,750,000) to the Osmose charges ($1,391,250) and the total "owed" to PacifiCorp by Comcast is $10,141,250. Just like that, PacifiCorp has financed the entire $10 million multi-state audit.

Second, as of April 6, 2004, when this Commission forbade PacifiCorp from requiring payment of the disputed $250 unauthorized attachment penalty as a condition for processing additional Comcast applications,[191] Comcast had paid approximately $5.4 million to PacifiCorp.[192] Not coincidentally, as of May 14, 2004, PacifiCorp had paid approximately $5 million of the total $10 million contract amount to Osmose.[193]

F. The $250 Penalty is Not Intended to Deter Comcast.

PacifiCorp paints a picture of a cable company gone wild in Utah. This caricature is intended to make the Commission believe that the $250 penalty is necessary to motivate

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189 Fitz Gerald Initial Testimony, p. 31.
190 *Id.*, p. 40.
191 *See* Order on Motion for Immediate Relief.
192 *See* Nadalin Initial Testimony, p. 7.
193 Fitz Gerald Dep. pp. 88-89.

Comcast to comply with permitting requirements. However, these mischaracterizations are wholly inconsistent with the parties' prior cooperative relationship. PacifiCorp's claims that Comcast is systematically ignoring PacifiCorp's application process and that the $250 penalty is necessary to "rein Comcast in" are completely unfounded.

The bulk of the testimony Comcast has provided in this case shows that Comcast has attempted to comply with PacifiCorp's permitting application requirement since it began its initial build out. The evidence also shows, however, that PacifiCorp changed those requirements over time and that they often varied from district to district.[194] Rather than pointing toward Comcast's ignorance or indifference to permitting requirements, the evidence strongly suggests that there was a major disconnect between the expectations of PacifiCorp's staff in its Portland, Oregon headquarters and those of its field employees in Utah.

1. There is no Evidence That Comcast Refused to Comply With the Permitting Procedures as PacifiCorp Articulated Them

PacifiCorp has not been able to produce any credible evidence showing that Comcast was not self-motivated to make safe attachments. Prior to the initiation of the 2002/2003 Audit and the associated $250 penalty charges, Comcast and PacifiCorp enjoyed a very good working relationship.[195] Each party brought problems or concerns to the other's attention and sought a mutually agreeable resolution.[196] As Mr. Harrelson, Comcast's expert, has explained, this is the most effective means of managing joint use of poles.[197]

In connection with this case, Comcast provided PacifiCorp with approximately 17,000 pages of documents related to the overlash and new attachment applications Comcast

[194] *See* Goldstein Initial Testimony, p. 3; Bell Initial Testimony pp. 4-5; Deffendall Initial Testimony, pp. 4-8.

[195] *See* Bell Initial Testimony, p. 2; Sur-rebuttal Testimony of Rodney Bell, submitted July 26, 2004, pp. 2-3; Deffendall Initial Testimony, p.8.

[196] *See* Bell Initial Testimony, pp. 9-10.

[197] *See* Harrelson Initial Testimony, pp. 9-10, 16, 41; Harrelson Sur-rebuttal testimony, p. 3.

submitted. The sheer volume of the materials belies PacifiCorp's claims that Comcast has systematically refused to comply with PacifiCorp's permitting requirements. Moreover, Marty Pollock, Gary Goldstein, Mark Deffendall, and Rodney Bell all testified to the ways in which they each complied with the permitting requirements in place at the time they were making applications.[198] PacifiCorp's allegations that Comcast failed to follow the proper procedures are simply not credible. Indeed, PacifiCorp has offered them only to divert the Commission's attention from the real issue in this case, PacifiCorp's massive money grab.

2. Internal Conflicts Within PacifiCorp

PacifiCorp's Utah field personnel and permit coordinators in Portland have different understandings and expectations of how the permitting process is supposed to work. Even though Ms. Fitz Gerald claims that there were centralized permitting procedures effective sometime in 1996 or 1997,[199] her own field employees in Utah were not implementing them.[200] Mr. Harrelson has explained that this is not uncommon.[201] Corporate-level employees like Ms. Fitz Gerald who are removed from field operations often have a different view of how field operations should—or are—being conducted.[202] Although PacifiCorp's staff in Portland may have intended for a formal, written permitting process, Utah Power field employees, many of whom may have been there years before Ms. Fitz Gerald came along, appeared to continue to do business as they always have: based on field relationships. As Mr. Harrelson explained, these field relationships are based largely on trust and a history of working together cooperatively.[203]

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[198] *See* Section IV.C. above.

[199] *See* Fitz Gerald Initial Testimony, p. 13.

[200] Ms. Fitz Gerald acknowledges that it was not until approximately 2000 that she started getting any significant number of calls from PacifiCorp field personnel about the joint use processes and procedures she had been attempting to implement. *See* Fitz Gerald Dep. pp 80-81.

[201] *See* Harrelson Sur-Rebuttal Testimony in Response to Jackson's Testimony, pp. 5-6.

[202] *See id.*, pp. 9-10.

[203] *See* Harrelson Initial Testimony, p. 15.

The fact remains, however, that Comcast has always been willing to comply with PacifiCorp's reasonable permitting requirements and has even tried to comply with some that are *not* reasonable. The fundamental break down in the process appears to be with PacifiCorp's Portland staff's unwillingness to acknowledge the diversity of requirements in the field and the inconsistencies in the way different districts have historically managed joint use. Such an acknowledgment would be inconsistent with PacifiCorp's profit-generating agenda. Although Ms. Fitz Gerald goes to great lengths to explain how she *trained* her employees to follow the processes,[204] the simple fact is that she is not out in the field on a daily basis. By all accounts, PacifiCorp field employees' conduct was not consistent with PacifiCorp's headquarters' directives until at least 2000 or 2001.[205]

3. PacifiCorp's Claims That Comcast is a Bad Actor are Nothing More Than Excuses Concocted to Justify Unfair Permitting Practices

PacifiCorp has falsely alleged that it has been forced to implement the $250 penalty because Comcast breached the trust on which field relationships are based.[206] However, PacifiCorp's "evidence" of this consists of a couple allegations Brian Lund made about unnamed contractors making vague statements about Comcast's alleged instructions. These hearsay statements are not credible. PacifiCorp has not identified the individuals supposedly making these statements, and, more important, the only statements PacifiCorp references are those made in February 2004, well into this litigation.[207] PacifiCorp does not identify any evidence of

[204] *See* Fitz Gerald Initial Testimony, pp. 26-27; Fitz Gerald Rebuttal Testimony, p.7.

[205] *See* Fitz Gerald Dep. pp. 80-81. At about the same time, PacifiCorp increased significantly the size of its Joint Use staff. In 2002, staff increased from approximately 2 employees to 22 employees. *See id.*, pp. 23-28.

[206] Sur-rebuttal Testimony of Brian Lund, p.3, submitted July 22, 2004; Sur-Rebuttal Testimony of Thomas Jackson, filed, pp. 5-6, July 26, 2004.

[207] *See* Initial Testimony of Brian Lund, pp. 6-8, submitted July 2, 2004; Lund Sur-Rebuttal Testimony, p. 4.

Comcast's alleged plan to circumvent PacifiCorp's permitting requirements *prior* to the initiation of the 2002/2003 Audit.

The question may seem obvious, but if Comcast was such a bad actor, why did PacifiCorp wait until *after* the litigation to raise these concerns, and why can it only point to one episode *after* it had nearly completed the audit? The answer is equally obvious: PacifiCorp has fabricated this entire issue as yet another *post hoc* rationalization for its penalty scheme, and to distract the Commission from its patently unlawful conduct.

4. Comcast Cannot Deliver Its Services if the Poles Fail

Finally, Comcast has no motivation to by-pass PacifiCorp's permitting requirements or install facilities unsafely. Regardless of whether the attachments are authorized or unauthorized, Comcast has the same obligation to maintain and install its attachments safely. Comcast has absolutely nothing to gain from shoddy or unsafe installations.[208] PacifiCorp's false allegations regarding Comcast's willingness to cut corners to get the job done ignores one important fact—Comcast depends on the safety and reliability of the poles to provide its services. If the poles come down, or if PacifiCorp's electric service is interrupted, Comcast cannot deliver its services to its customers.

VI. PACIFICORP'S UNAUTHORIZED PENALTY SCHEME IS UNJUST AND UNREASONABLE BECAUSE THE AUDIT RESULTS ARE NOT RELIABLE

In addition to the numerous reasons why PacifiCorp's $250 penalty should be rejected outright, so too should PacifiCorp's core contention that Comcast has attached to 35,492 new poles since 1999. Assuming an industry-standard rule of thumb of 35 poles per mile, in order for Comcast to attach to as many new poles as PacifiCorp alleges, Comcast would have

[208] *See Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd. 11450, ¶¶ 12-13.

had to build more than 1,000 miles of new aerial plant since 1999.[209] This has simply not happened.

PacifiCorp explanations of how it (erroneously) believes Comcast has engaged in such a massive build-out since 1999 is based on generalized assumptions and conjecture. Ultimately, there is only one conclusion to reach: that PacifiCorp's audit is unreliable.

A. Comcast Has Not Attached to More than 35,000 New Poles or Made 1000 Miles of New Attachments on PacifiCorp Poles

Comcast simply has not attached to 35,000 new poles since the 1997/1998 audit. As Gary Goldstein, Rodney Bell and Mickey Harrelson all have explained, 35,000 new poles is the equivalent of about 1,000 miles of new construction.[210] Despite PacifiCorp's protests, Comcast simply has not constructed that much new aerial plant.

Gary Goldstein, who works in Comcast's design department, has first-hand knowledge of the fact that Comcast has not designed significant amounts of new aerial plant.[211] In fact, most new Comcast construction involves extensions of existing lines into new housing developments. The majority of these line extensions are underground.[212]

It is true that, beginning in 1999, Comcast's predecessor began upgrading its systems in Utah, but this upgrade was accomplished by overlashing. Overlashing does not involve the placing of a new attachment but lashing a new wire to existing attachments. There is

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[209] *See* Harrelson Rebuttal Testimony, p. 6; Bell Rebuttal Testimony, p. 2; Goldstein Rebuttal Testimony, p. 2.

[210] *See* Harrelson Rebuttal Testimony, p. 6; Bell Rebuttal Testimony, p. 2; Goldstein Rebuttal Testimony, p. 2.

[211] *See* Goldstein Rebuttal Testimony, p. 2.

[212] *Id.*

no new strand, clamp, bolt, or hole drilled into the pole. This method has accounted for 98-99% of the upgrade.[213]

B. The 1997/1999 "Baseline" is Not a Credible Basis for the Number of New Comcast Attachments

As indicated, PacifiCorp's entire case rests on its assertion that the 1997/1999 Audit is the "baseline" for the 2003 Audit. Fatal to this claim is the fact that PacifiCorp has not produced a single record from of that audit, so its accuracy is impossible to verify.[214] In addition, the scope and parameters of the 2003 Audit are very different from the 1997/1999 Audit. For example, PacifiCorp has expressly stated that "in the 1997/1998 inventory effort PacifiCorp *did not attempt to identify the number of attachments owned by each communications entity* nor did it assess compliance issues. The scope of the 1997/1998 inventory was limited to determining which communications companies were attached to PacifiCorp owned poles and to which third-party poles PacifiCorp was attached."[215] If PacifiCorp did not count the number of attachments in its prior audit, how could this possibly be used as a baseline by which to compare the current audit?

Moreover, it is not reasonable for PacifiCorp to undertake a system-wide audit, but not keep any documentation of the work completed. Since PacifiCorp is now claiming that it conducted this audit with the full knowledge that it would use the information to establish a baseline for future audits,[216] it is manifestly unreasonable that it did not keep records. PacifiCorp, thus, has ensured that no tools are available for challenging its unsupported

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[213] *See* Bell Initial Testimony, p.7; Goldstein Initial Testimony, p. 7; Pollock Sur-rebuttal Testimony, p. 10.

[214] *See* Section II.C., *supra*.

[215] PacifiCorp Discovery Response No. 15.

[216] Fitz Gerald Rebuttal Testimony, pp. 12-13.

conclusions and it cannot reasonably expect either Comcast or this Commission to go on "faith" that PacifiCorp's past records (if any) and current audit results are accurate.

C. Comcast Has Complied With PacifiCorp's Permitting Requirements Throughout The Course Of Their Relationship, And Those Of Their Predecessors.

The evidence simply does not support PacifiCorp's attempts to portray Comcast as a free-loading scofflaw intent on "stealing" pole space. Comcast has submitted thousands of applications for both new attachments and overlashed cables over the course of the parties' relationship. For years, PacifiCorp gave approval for Comcast to attach without requiring formal written applications. That notwithstanding, PacifiCorp repeatedly accuses Comcast of keeping poor records or having no records at all. These allegations are manifestly unfair. Moreover, PacifiCorp did not begin making these allegations until it was forced to defend its unauthorized penalty scheme. The truth of the matter is that PacifiCorp's history of de-centralized application process, and poor record keeping—and not Comcast's "theft" of pole space—are the reason for PacifiCorp's inability to find affirmative authorization for Comcast's attachments.

1. PacifiCorp has no Records Relating to Comcast's Original Cable Build in the 1970's and 1980's

It is undisputed that Comcast's predecessor TCI submitted applications and received approval to attach to Utah Power's poles in the late 1970's and early 1980's.[217] In connection with this case, Comcast produced several boxes of the maps and Exhibit A's used to permit the Salt Lake Valley attachments. Even though Utah Power received at least one copy of the permitting maps and Exhibit A's, PacifiCorp has no such records.[218]

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[217] *See* Section IV.C.1., *supra*; *see also* Cordova Dep. pp. 17-20.
[218] *See* Goldstein Initial Testimony, pp. 5-6.

This is important because the format of the original permitting maps and Exhibit A's are drastically different than the format of PacifiCorp's current record keeping system. As Ms. Fitz Gerald explained in her testimony, PacifiCorp currently keeps its joint use information in its "JTU database."[219] In PacifiCorp's JTU, the poles are organized by mapstring and point number.[220] The mapstring is a regional identifier that applies to a large number of poles in a specific geographic area. The point number is the number that follows the mapstring to identify a specific pole within the mapstring's geographic area.[221] It was not, however, always this way.

The original permitting maps and Exhibit A's had no mapstrings or point numbers.[222] As Gary Goldstein explained in his testimony, the maps were numbered to correspond with PacifiCorp's internal mapping system and then each pole on each map was numbered, starting with 1.[223] Comcast has thousands of pages of permitting documents reflecting this, each containing as many as 500 poles. However, PacifiCorp has never explained how it reconciled the numbering systems on these maps and Exhibit A's with the mapstring and point numbers that were later implemented. Further, PacifiCorp has presented no evidence demonstrating that it has incorporated these records into its JTU database or that Ms. Fitz Gerald or other members of PacifiCorp's joint use staff took any steps or established any processes for converting the data from the older Exhibit A format to the current format PacifiCorp uses in the JTU.

More important, Comcast has no easy means of cross referencing these permits against PacifiCorp's mapstring and point numbers to provide proof of authorization.[224] The only

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[219] Fitz Gerald Initial Testimony pp. 16-17.
[220] Initial Testimony of Sara Johnson, submitted July 2, 2004, p. 8.
[221] *Id.*
[222] *See* Goldstein Initial Testimony, p. 4; Goldstein Rebuttal Testimony, pp. 6-7.
[223] *See* Goldstein Initial Testimony, p. 4.
[224] *See* Goldstein Rebuttal Testimony, p. 7.

feasible means of comparing the records are to cross-reference GPS coordinates with the maps, assuming of course, that the GPS coordinates are accurate.[225] Gary Goldstein recently engaged in such an exercise and compared a limited number of the poles PacifiCorp claimed to be unauthorized with the Exhibit A's and accompanying maps.[226] His conclusion was that the maps and Exhibit A's showed that the poles were permitted, contrary to PacifiCorp's claims.[227]

PacifiCorp has not refuted these results. Instead, PacifiCorp's only response to Mr. Goldstein's claims was to complain that he had not brought this to its attention previously.[228] This is not reasonable. Comcast has identified numerous flaws and inconsistencies in PacifiCorp's "unauthorized" attachment initiative, casting a large shadow of doubt over the accuracy of the entire project. It would be unreasonable to require Comcast to prove PacifiCorp wrong pole-by-pole given the overwhelming evidence of the fundamental inaccuracies of the audit.

2. In the 1990's, PacifiCorp Followed an Informal Permitting Process

PacifiCorp argues that infrastructure expansion during the 1990's somehow translates to 35,000 unpermitted attachments and a reckless disregard by Comcast for permitting procedures and safety concerns. This line, fails, however, to recognize that PacifiCorp was rushing to meet boom-level demands for electric service. As Mark Deffendall explained in his testimony, PacifiCorp was barely keeping up with providing electric service for new construction and new developments.[229] As a result, PacifiCorp field personnel showed little interest in expending time or resources on cable operators' pole applications. Even if PacifiCorp accepted

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225 *Id.*, p. 5.
226 *Id.*, pp. 4-6.
227 *Id.*
228 *See* Fitz Gerald Sur-rebuttal Testimony, pp. 8-9.
229 *See* Deffendall Initial Testimony, p. 6.

the applications, it was unlikely to process or return approvals or denials.[230] Given PacifiCorp's practices and policies, it makes sense that neither Comcast nor PacifiCorp would have extensive permitting records for this time period.

PacifiCorp's attempt to paint Comcast—and all of the cable industry—as renegade attachers is irresponsible. PacifiCorp has not identified any evidence showing that Comcast did not take its construction responsibilities seriously. Indeed, the thousands of pages of permitting maps and Exhibit A's show how meticulously Comcast plotted out its original permits. PacifiCorp's non-specific anecdotal evidence about what "the cable industry" may have been doing is completely irrelevant.[231] The evidence shows that in this case, Comcast presented thousands of applications for permits.

Contrary to PacifiCorp's allegations, Comcast has been making great efforts to comply with PacifiCorp's current permitting requirements, even as they have changed. Even though it is neither reasonable nor necessary for PacifiCorp to require advance permits for overlashes,[232] Comcast has nonetheless devoted significant resources to making overlash applications as PacifiCorp has requested. PacifiCorp's claim that Comcast is refusing to follow the permitting process is simply not supported by facts.

PacifiCorp also argues that where Comcast has filed applications, it has done so inadequately. That argument is not credible. For example, PacifiCorp's most frequent complaint is that Comcast does not include pole numbers (mapstring and point numbers) on applications. However, as Comcast's Marty Pollock has explained, a number of the poles in the field do not

[230] *Id.*, p. 8; Bell Initial Testimony, p. 6.
[231] Fitz Gerald Sur-rebuttal Testimony, pp. 10-12; *see generally* Jackson Sur-rebuttal Testimony.
[232] *See* Harrelson Initial Testimony, pp. 23-24, 26.

have tags.[233] Despite Ms. Fitz Gerald's protest that it is not possible that untagged poles exist in the field,[234] Comcast's field personnel come across them regularly.[235] Indeed, Comcast understands that field conditions do not always meet the expectations of headquarters personnel.

The fact is, if poles are not tagged, Comcast cannot provide the information usually contained on the tags in its applications. However, it is critical that Comcast be able to identify the poles accurately on the applications. That is why Comcast tries to work with PacifiCorp coordinators to find other ways to identify the poles, and why field relationships are critical to joint use. For example, Marty Pollock includes street address information on applications, where available, or landmarks or other identifiers.[236] If PacifiCorp's permit coordinators still do not understand which poles Comcast is applying for, they often send copies of PacifiCorp's service maps and ask Comcast to mark the specific poles. Mr. Pollock and the PacifiCorp permit coordinators have found this last-resort method to be quite helpful.[237]

Historically, Comcast and PacifiCorp were able to work together by exploring alternative identification methods, such as these. However, when PacifiCorp personnel steadfastly refuse to acknowledge that untagged poles exist, or refuse to explore alternative identification methods, there is little Comcast can do. This type of rigid adherence to the rules favors form over substance, ignores the complexities of joint use and is not a productive means of managing pole plant.[238]

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[233] *See* Pollock Sur-rebuttal, pp. 5-9.

[234] *See* Fitz Gerald Rebuttal Testimony, p. 12. Ms. Fitz Gerald's adamant statement about field conditions reflects a major theme in this case: that staff in Portland's idea of how field operations should be conduct diverges from actual field conditions.

[235] *See* Pollock Sur-rebuttal testimony, p.8.

[236] *Id.*, pp. 5-9.

[237] *Id*, p. 8.

[238] *See generally*, Harrelson Initial, Rebuttal and Sur-rebuttal testimony.

When PacifiCorp began requiring applications for overlashes, it did not have a system for processing these applications. As correspondence between the parties indicates and as Marty Pollock explained in his testimony, this was very frustrating for Comcast.[239] On one hand, PacifiCorp insisted that Comcast file applications, while on the other hand, PacifiCorp personnel were unable to articulate a process for doing so.

PacifiCorp claim that Comcast should have been well-versed in PacifiCorp's application process simply by reading the pole attachment agreement is unreasonable.[240] The pole attachment agreement could not tell Mr. Pollock what format (fax, email, mail) the permit coordinators preferred, or what to do when there was incomplete information in the field due to missing tags. The application process necessarily involves human interaction and requires some communication back and forth between the parties to establish a workable process.[241] Mr. Pollock has had many years experience with joint use and permit applications.[242] His experience had shown that, when faced with a new permitting task, the best way to ensure acceptable attachment requests was to call the person directly.[243]

PacifiCorp's complaints about Comcast's applications processing arose only in the context of this litigation. The vituperation and accusations in PacifiCorp's pre-filed testimony fundamentally misrepresent the parties working relationships and are intended to draw attention away from PacifiCorp's own unreasonable conduct here. It portrays those relationships as difficult and adversarial when actually they have been friendly, cooperative, professional and

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239 *See* Pollock Sur-rebuttal Testimony, pp. 2-3.
240 *See* Fitz Gerald Rebuttal Testimony, pp. 7-9.
241 *See* Pollock Sur-rebuttal Testimony, p. 6.
242 *See* Pollock Initial Testimony, p. 1.
243 *See* Pollock Sur-rebuttal Testimony, pp. 2-4.

marked by mutual respect.[244] More important, until the dispute over the $250 penalty arose, PacifiCorp did not complain about Comcast's performance so long as Comcast continued to pay PacifiCorp's outrageous penalties.

D. Other Evidence Undermines the Integrity of PacifiCorp's Unauthorized Attachment Methodology

In addition to the evidence Comcast already presented casting doubt on the accuracy of PacifiCorp's audits and demonstrating that it simply has not attached to 35,000 new poles since 1999, there is plenty of additional evidence that undermines the reliability of PacifiCorp's audit results.

1. PacifiCorp Cannot Provide Satisfactory Evidence of its Ownership of the Poles it is Auditing

In another proceeding currently before the Commission, a number of pole owners have alleged that PacifiCorp has tagged and identified their poles as belonging to PacifiCorp and has charged the pole owners unauthorized attachment penalties for occupying their own poles![245] PacifiCorp's response to these other pole owners is consistent with the position it has taken with Comcast: all audit results are presumed accurate unless the challenging party can produce conclusive documentary evidence. This is true even where PacifiCorp cannot produce any documentary evidence to support its own position.

It is not difficult to see how the misidentification of poles could happen. In its instructions to Osmose for the 2002/2003 Audit, PacifiCorp directed Osmose technicians in the

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[244] *See* Initial Testimony of Rodney Bell, submitted July 2, 2004, p. 2; Sur-rebuttal Testimony of Rodney Bell, submitted July 26, 2004, pp. 2-3; Initial Testimony of Mark Deffendall, submitted July 2, 2004, p.8.

[245] *See In the Matter of An Investigation into Pole Attachments*, Initial Comments of the URTA to the Draft, Docket No. 04-999-03, attached hereto as Exhibit 17; *In the Matter of An Investigation into Pole Attachments*, Reply Comments of Qwest Corporation, Docket No. 04-999-03, attached hereto as Exhibit 18.

field to assume that all poles belong to PacifiCorp.[246] In light of these allegations, Comcast has a reasonable concern that PacifiCorp is charging Comcast "unauthorized" attachment penalties on poles it does not even own., which, incidentally explains why PacifiCorp cannot find the permits for those attachments.

2. PacifiCorp Has No Documentation Tracing Attachment Authorizations for Poles Previously Owned by Qwest

Comcast is concerned that PacifiCorp is charging Comcast "unauthorized" attachment penalties on poles that were originally owned by Qwest, but were sold or transferred to PacifiCorp.[247] If Qwest owned those poles at the time of original attachment, Qwest, not PacifiCorp, would have the permitting records. It is unreasonable to penalize Comcast for failure to file a permit with PacifiCorp if PacifiCorp was not the pole owner at the time of application.

3. PacifiCorp Charged Comcast for Attachments Outside of its Cable Television Franchise Area

After Comcast began receiving unauthorized attachment notices, it hired MasTec, an independent contractor, to attempt to verify PacifiCorp's survey results. Although MasTec found that *generally* the audit results showed that Comcast was attached to the poles indicated,[248] MasTec did uncover some discrepancies. In the area MasTec surveyed, it found that PacifiCorp had attributed twenty two attachments to Comcast, even though they were outside Comcast's franchise area.[249] Whereas 22 attachments may not seem to be a large number at first blush, they translate into $5500 in unauthorized attachment penalties, plus inspection costs. Assuming a

[246] *See* PacifiCorp Joint Use/NESC Violation Training and Operations Manual, Bates No. PC 6138, Exhibit PC 2.3.
[247] *See* Fitz Gerald Dep. p. 117.
[248] *See* Nadalin Rebuttal Testimony, p. 8; Exhibit PC 1.9.
[249] *See* Goldstein Sur-rebuttal Testimony, pp. 2-3.

minimum of 22 erroneous attachments in each of the 7 districts, that would be $38,500 in unauthorized attachment penalties.

4. PacifiCorp's Audit Identified Attachments Made and Permitted in the Late 1970's and Early 1980's as Unauthorized

Gary Goldstein has proven that PacifiCorp has assessed "unauthorized" attachment penalties for attachments in the Salt Lake Valley that the original permitting maps and Exhibit A's show were permitted some 20 years ago.[250] As discussed above, Comcast has concerns that PacifiCorp was never able to cross reference the poles appearing on the maps and Exhibit A's with mapstring and point numbers and enter them into its JTU. [251] On a more fundamental level, Comcast questions whether Ms. Fitz Gerald's joint use staff in Portland ever received copies of these maps, given Utah Power's de-centralized permitting and record keeping system.[252] If this indeed is the case (as all reliable evidence indicates) it would certainly explain why PacifiCorp has no record of these (and other) authorizations in its JTU mainframe.

5. PacifiCorp Cannot Verify That Attachments Made Before 1999 Were Granted "Amnesty"

PacifiCorp never provided the results of the 1997/1999 Audit to Comcast, either at the time of the audit or in connection with this litigation. The only notice that Comcast ever received—apparently—was an increased number of poles in its rental invoices.[253] Again, because there is no way of verifying the base line audit results, Comcast does not and cannot know which of its attachments PacifiCorp deemed authorized.

VII. PACIFICORP IS DERIVING ENORMOUS ADDITIONAL AND UNLAWFUL BENEFITS FROM THE COMCAST-FUNDED AUDIT

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[250] *See* Goldstein Rebuttal Testimony, pp. 4-6.
[251] *See* Section VI.C.1., *supra*.
[252] *See* Fitz Gerald Initial Testimony, p. 25; Fitz Gerald Dep. pp. 56-57.
[253] *See* Fitz Gerald Sur-Rebuttal Testimony, p. 3.

In addition to the financial windfalls that PacifiCorp has reaped from its audit program to date, it stands to recover other valuable benefits as well. It is no secret that PacifiCorp is in the midst of a $200,000,000 state-wide upgrade of its Utah outside plant (known as project Quantum Leap), including its distribution facilities.[254] Beginning in approximately 2001, PacifiCorp under took a "connectivity audit" of its distribution network. The purpose of this audit was both to keep, establish, and maintain a connectivity database of PacifiCorp's electric facilities (*i.e.* above the communications space on the poles) and mapping systems to be used for electric service outage detection and other purposes. The 2001 Audit apparently did not identify specific poles by GPS coordinate and mapstring as the 2003 Osmose Audit did. Data from this 2001 connectivity audit, as with the 2003 pole audits, was captured and retained in the FastGate® database management application. Under the guise of supposedly detecting Comcast's "unauthorized attachments" in the 2003 audit, PacifiCorp now has a brand new data base of *all* its distribution poles, of *all* communications attachments on those distribution poles, complete with pole address, mapstring numbers, GPS coordinates and digital photographs. This new database, is a powerful supplement to—indeed completes—the 2001 connectivity audit.

The crowning triumph for PacifiCorp is that it had designed a way for this entire new database to be paid for by Comcast. It is bedrock pole attachment law that an attaching party cannot be forced to pay for work—whether construction, make-ready, plant corrections or engineering and inspections—if that work is to benefit another party.[255] The value and benefit

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[254] *See* Fitz Gerald Dep. p. .

[255] 47 U.S.C. § 224(i); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 1211-16 (1996) ("*Local Competition Order*") (requiring all parties to pay for their own make-ready); *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, ¶ 12, 16 (2000) (utility is prohibited from holding attacher responsible for costs arising from the correction of safety violations of other attachments), *vacated by settlement* 2002 FCC LEXIS 6385 (Dec. 3, 2002); *Newport News Cablevision, Ltd. Communications Inc. v. Virginia Elec. & Power Co.*, 7 FCC Rcd. 2610, ¶ 8 (1992) ("costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary").

that PacifiCorp derives from this Comcast-funded inspection, survey and new database far exceeds what is reasonable or permissible for an attacher to fund under this prevailing law.[256] To the extent that these expenditures are reasonable and prudent for the utility's management of its assets for its core utility purposes, they should be paid by the utility or shared among all its electric ratepayers, not financed by one attacher to its poles.

VIII. PACIFICORP'S ALLOCATION OF AUDIT FEES IS UNJUST AND UNREASONABLE

In addition to charging Comcast approximately $9 million in unauthorized attachment penalties, PacifiCorp has also charged Comcast $13.25 per attachment in survey costs.[257] PacifiCorp's explanation of how it came up with $13.25 is somewhat confusing. Although PacifiCorp's Corey Fitz Gerald has identified $13.25 as the per attachment charge, the calculations PacifiCorp submitted in support of this charge reflect a $13.80 charge.[258] In either event, PacifiCorp's math is far from straightforward.

To summarize, PacifiCorp claims that has calculated its costs of the audit on a district-by-district basis by adding together the following components: $12.27 *per pole* Osmose charged for the audit + costs of other contractors involved in the audit + the cost of PacifiCorp employees involved in the audit.[259] However, PacifiCorp claims that it backs out 12% of these costs as attributable to itself and any passes 88% of the costs onto attachers.[260] The following chart summarizes the costs PacifiCorp attributes to attachers:

District	JU Poles	"Cost"	Per-Pole Average
Layton	15,619	$170,301.62	$10.90

[256] *Cable Texas, Inc. v. Entergy Servs., Inc.*, 14 FCC Rcd. 6647 (FCC Cable Service Bureau 1999); *Newport News Cablevision, Ltd. Communications Inc. v. Virginia Elec. & Power Co.*, 7 FCC Rcd. 2610, ¶ 8 (1992).

[257] *See* Fitz Gerald Initial Testimony, p. 40.

[258] *See* Exhibit PC 2.5

[259] *See* Fitz Gerald Initial Testimony, pp. 39-40.

[260] *Id*.

American Fork	19,791	$197,183.58	$9.96
Ogden	35,789	$401,935.48	$11.23
Evanston	1,936	$ 31,616.15	$16.33
Kemmerer	2,864	$ 59,003.94	$20.60
Totals	75,999	$860,040.77	$ 11.32

According the information PacifiCorp provided, the average per-pole cost of the audit should be $11.32 based on data collected across all five districts. This $11.32 rate is calculated taking the total cost of the audit, which PacifiCorp identifies as $860,040.77 and dividing it by the total number of poles audited, which PacifiCorp identifies as 75,999. However, rather than using the per-pole average cost, PacifiCorp calculated the average district level rates and then took an average of those averages. In other words, instead of dividing the total cost by the total number of poles, PacifiCorp has added together each of the district averages ($10.90 for Layton; $9.96 for American Fork; $11.23 for Ogden; $16.33 for Evanston; $20.60 for Kimmerer) and divided that number by five (the number of districts). The effect is that the higher cost districts, which have fewer poles, artificially inflates the rate by about $2.50 per pole to reach the $13.80 PacifiCorp is currently charging. These calculations are expressed as follows:

- PacifiCorp's artificially inflated rate: (10.90 + 9.96 + 11.23 + 16.33+ 20.60) / 5 = **$13.80**
- A true per-pole average of costs: $860,040 / 75,999 = **$11.32**

This results in an over-recovery. Multiplying PacifiCorp's rate of $13.80 by the 75,999 poles in these five districts, PacifiCorp will recover $1,049,546.19 in audit charges. Using the other rate PacifiCorp has identified, $13.25, PacifiCorp will recover $1,006,886.70. In either case, it exceeds the PacifiCorp's stated "costs" of doing the audit: $860,040.77.

Furthermore, these calculations assume that Comcast is the only attacher on the pole and that Comcast has only one attachment per pole. However, Comcast typically is not the only attacher on the pole. PacifiCorp is charging each joint user this $13.80 or $13.25 charge *per*

attachment, not per pole.[261] So, if there were two parties on a pole it would charge $27.60, or $41.40 if there were three parties, assuming each party had only one attachment. If each party had multiple attachments, the recovery would be even higher. To summarize, PacifiCorp stands to double, triple or even quadruple recover its $11.32 per-pole audit costs.

IX. AFTER ASSESSING THE $250 PENALTY, PACIFICORP'S NEXT PRIORITY IS TO FINE ATTACHERS CLEAN UP ITS POLE PLANT AT THEIR EXPENSE

Since the beginning of the 2003 Audit, money and free databases—not safety—have been PacifiCorp's primary concern. As the Commission has previously recognized, it was not until February 2004 that PacifiCorp began offering safety issues as a justification for its $250 penalty and its refusal to process Comcast's attachment applications.[262] Indeed, PacifiCorp has not offered any credible evidence to support its unfounded allegations that Comcast has engaged in long-term, systematically unsafe practices. Quite the opposite, the parties' prior course of dealing has always been to bring any hazardous issues to the other's attention and to address them as soon as possible.[263]

Over the course of the parties' history, PacifiCorp has not been as concerned in the past with technical violations or with 12 inch separations between communications conductors as it claims to be now.[264] In fact, as PacifiCorp acknowledges, in the 1997/1999 Audit, it did not collect any safety or clearance information.[265] Regardless, PacifiCorp has made it abundantly clear that it is now interested in strict adherence to code and plant clearances.[266] However, the timing and circumstances of PacifiCorp's interest in plant clean-up are suspect. By

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[261] *Id.*, p. 40; Fitz Gerald Dep. pp. 109-111.
[262] *See* Hearing Transcript, p. 63.
[263] *See* Bell Initial Testimony, pp. 9-10.
[264] *See* Bell Sur-rebuttal Testimony, p. 5.
[265] *See* Supplemental Response of PacifiCorp to Claimant's First Set of Data Requests, dated April 1, 2004, Response No. 15, p. 23.
[266] *See* Bell Initial Testimony, pp. 10-12.

blaming Comcast for plant conditions, PacifiCorp appears to be absolving itself of its own neglect and mismanagement of pole assets throughout the parties' 25 year relationship, and again, looking to Comcast's "deep pockets"[267] to pay for it.

More important, many of the violations PacifiCorp has identified and that it is requiring Comcast to pay to correct do not constitute NESC violations.[268] As Comcast's expert Michael Harrelson has explained, the instructions given to PacifiCorp's contractor, Osmose, and the results of the survey are laden with inaccuracies.[269] It is unjust and unreasonable to require Comcast to pay to correct the "violations" PacifiCorp has identified under these circumstances.

A. Comcast Is Only Responsible For Correcting Violations It Created and PacifiCorp Is Responsible For Its Share of the Violations

Notions of fairness, standard industry practice and long-standing FCC precedent all dictate that the party who causes a violation should be responsible for correcting that violation.[270] However, PacifiCorp's position is that Comcast is presumed to be at fault—and responsible for corrections—unless proven otherwise. PacifiCorp's position defies logic and is inconsistent with prevailing law and the parties' prior practice.

To the extent that any other party, including PacifiCorp, installed its plant out of code, those parties must bear the expense of engineering and make-ready remediation. The FCC has expressly stated that an attaching party should not be responsible for costs that do not directly relate to its attachments and "the inspection costs should be allocated among the

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[267] *See* Bell Initial Testimony, p. 11.

[268] *See* Harrelson Initial Testimony, p. 42; Harrelson Rebuttal Testimony, p. 15.

[269] *See* Harrelson Rebuttal Testimony, pp. 7-14.

[270] *See Cavalier Telephone*, 15 FCC Rcd. 9563, ¶¶ 12, 16 (utility may not require attacher to pay the costs incurred by other attachers; utility is prohibited from holding attacher responsible for costs arising from the correction of safety violations of other attachments); *Newport News*, 7 FCC Rcd. 2610, ¶ 8 ("costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary"); *Local Competition Order*, 11 FCC Rcd. 15499, ¶¶ 1212 ("a utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost").

beneficiaries of the inspection."[271] Thus, PacifiCorp may not force Comcast to pay for the costs of correcting other attachers' violations, or any pole-related work undertaken for the benefit of other pole occupants. Moreover, electric utilities are responsible for the safety and integrity of their own facilities, and it is not the responsibility of a communications attacher to ensure that the pole owner is abiding by the National Electrical Safety Code and other applicable safety regulations.[272] Yet that is exactly what PacifiCorp is attempting to do. PacifiCorp has only recently begun to address clearance issues that have been amassing for decades. Furthermore, PacifiCorp does not provide specific evidence that Comcast is to blame. Instead, it presents testimony making sweeping and unfounded generalizations and this characterizing the entire cable industry as bad actors, with each claimed violation presumed to be cable's fault.[273] This is not reasonable.

There are several explanations for the current condition of PacifiCorp's pole plant. First, subsequent attachers may have created new violations when they installed their attachments.[274] Second, PacifiCorp has modified or added new electric equipment that encroached on communications space.[275] Third, local highway authorities may have re-graded the rights-of-way causing the ground levels to rise and making communications attachments appear to be at lower heights than they were at initial installment.

Although PacifiCorp makes much of the cable industry's build out, it ignores the fact that it has faced great pressure to build out its electric grid in response to the new growth. As Comcast's Mark Deffendall testified, in the 1990's, PacifiCorp was scrambling to provide

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[271] *Newport News Cablevision*, , 7 FCC Rcd 2610, ¶ 14.

[272] *See* note 305, *supra.*

[273] *See* Jackson Sur-rebuttal Testimony, pp. 5-9; Sur-rebuttal Testimony of James Coppedge, submitted July 22, 2004, pp. 5-6.

[274] *Id.*

[275] *See* Harrelson Initial Testimony, p. 10.

service to new customers and PacifiCorp field units at the district level had few resources to dedicate to joint use. [276] At that time, PacifiCorp only had 2-3 employees dedicated to joint use.[277] The fact of the matter is that PacifiCorp simply didn't have the resources to manage its poles. The result was that other attachers and even PacifiCorp itself made installations without doing make-ready and without notifying Comcast of any violations they created. In essence, PacifiCorp has done exactly what it has (wrongly) accused Comcast of doing: PacifiCorp has installed its facilities quickly and without regard for the code. The Commission needs look no further than the photographs attached to the expert testimony of Michael Harrelson.

B. PacifiCorp Has Created Many of the Violations it is Requiring Comcast to Correct

Although PacifiCorp is attempting to paint Comcast as a rogue for failing to adhere to an overly rigid application of the NESC, PacifiCorp glosses over its own compliance issues. In a number of instances PacifiCorp—not communications attachers—created the violation about which PacifiCorp is complaining. For example, the violations that Mr. Harrelson cites in his testimony include some where PacifiCorp built its electric facilities down into the space Comcast was occupying on the poles, causing a separation violation.[278] The NESC does not permit this. Nevertheless, under the old 1999 Agreement, PacifiCorp was required to provide Comcast 30 days notice prior to reclaiming pole space. However, Comcast has never received any such notice[279] and this provides one more example of PacifiCorp's double standard of faulting Comcast for supposedly not complying with procedures, but ignoring them itself.

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[276] *See* Deffendall Initial Testimony, p. 6; Coppedge Sur-Rebuttal, p. 2.
[277] Fitz Gerald Dep. p. 23.
[278] *See* Harrelson Initial Testimony, pp. 10, 43-44; Bell Initial Testimony, p. 9.
[279] *See* Bell Initial Testimony, p. 9.

In addition, and as explained in Mr. Harrelson's rebuttal testimony, numerous other types of electric power violations exist. For example, in one case PacifiCorp placed its electric cables within inches above cable television (where it should have been 40 inches), making it impossible for the cable company to transfer its facilities from the old pole to the new pole.[280] In another case PacifiCorp tied Comcast's facilities to new poles with rope, causing an unsafe situation.[281]

Again is clear from these examples is that PacifiCorp's application of the NESC and other standards is one-sided. While PacifiCorp attempts to hold Comcast to an unreasonably strict (and incorrect) interpretation of the NESC, it fails to apply the standards to its own construction with the same vigor and zeal. It is clear that the condition of PacifiCorp's pole plant is the result of many years worth of relaxed construction standards for which PacifiCorp, as the pole owner, bears responsibility.

C. PacifiCorp's Safety Audit Results Are Unreliable

1. PacifiCorp Has Incorrectly Identified NESC Violations In The Field

PacifiCorp's allegations of wide-spread safety violations are greatly over blown. As Mr. Harrelson and Mr. Bell discussed in their testimonies, many of the citations PacifiCorp submitted are for non-hazardous technical violations, and/or *conditions that do not constitute code violations*.[282] For example, out of the approximately 15,000 violation notices PacifiCorp presented to Comcast, a very substantial portion were for communications cable that were less than twelve inches apart.[283] However, failing to maintain 12 inches of separation between

[280] *See* Harrelson Rebuttal Testimony, Photos 2 and 3.
[281] *Id.*, Photo 1.
[282] *See* Harrelson Initial Testimony, p. 42; Harrelson Rebuttal Testimony, p. 15; Bell Sur-rebuttal Testimony, p. 4.
[283] *See* Bell Sur-rebuttal Testimony, p. 4.

communications conductors is not an NESC violation. As Mr. Harrelson explained in his testimony, twelve inches of separation is not a mandatory rule, but a normative guide line (it says "should" not "shall") and specifically allows for agreements between communications companies for lesser clearance.[284] Moreover the 12-inch separation guideline appeared for the first time at Rule 235.H.1 in the 2002 edition of the NESC.[285] Even if the rule had been mandatory, it still would not have applied to any of Comcast's attachments installed prior to 2002. NESC Rule 13.B.2. expressly grandfathers all attachments made before the effective date of the 2002 code.[286]

Furthermore, PacifiCorp does not appear to have a full grasp of the nuances of the NESC. Although *generally* the NESC requires 40 inches of separation between communications and electric facilities, there are provisions that permit shorter clearance distances. For example, the NESC permits secondary leads of street lights and secondary leads of service attachment points to be 12" from communications. However, PacifiCorp appears to be taking the incorrect position across the board that forty inches of separation is required for communications workers to work safely near power secondaries. This is wrong. The NESC and OSHA 1910.268 specify that qualified employees may work as close to "avoid contact" with that power secondary.[287]

2. PacifiCorp's Safety Audit Methodology and Execution is Flawed

Based on evidence PacifiCorp presented pertaining to training Osmose's personnel, it is likely that an in-depth review of the "violations" will uncover even more errors. Osmose's fielders had minimal training and the training they did receive was rife with errors and inconsistencies. In addition, it is clear from a simple review of the materials PacifiCorp provided

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284 *See* Harrelson Rebuttal Testimony, p. 15.
285 *Id.*
286 *Id.*
287 *See* Harrelson Initial Testimony, p. 42

that the focus of the safety component of the audit was on catching communications' attachers wrong doing, and not on a fair and consistent application of the NESC. These factors cast serious doubt over the reliability of the safety portion of the audit.

Contractors' training only included a three-week pass/fail class.[288] Although Osmose has years of pole plant experience, PacifiCorp conveniently overlooks the fact that many of the Osmose contractors conducting survey work had absolutely no pole attachment or joint use experience prior to the training classes.[289]

In addition to being inexperienced, the contractors received incorrect instruction on how to identify safety violations. In his testimony, Mr. Harrelson identified a number of errors and misapplications of the NESC in PacifiCorp/Osmose's written training materials. They include the following examples:

- Page PC 6149 of PacifiCorp's Exhibit PC 2.3 states: "communications worker's head has potential to make contact with energized power supply cables." However, no NESC rule prohibits a worker from being within the communications worker safety zone as the page implies. Rather, NESC Table 431-1 and Rule 431 state only that communications workers are to "avoid contact" with electric conductors ranging from 51 volts to 300 volts.

- On page PC 6149, the worker in the photograph should be wearing an insulating hard hat, but he is not.

- There are numerous violations on page PC 6149. The electric service weather head and the long drip loops underneath the transformer are right in the middle of the communications zone. Additional examples are at PC 6150, PC 6152 and PC 6162.

- Page PC 6150 depicts two cable television drops attached to cable facilities and above that what are likely two telephone drops. This page focuses on the 40 inches that should be maintained between power facilities and communications facilities. However, there is also a non-trivial electric violation: the drip loops at the secondary are excessively long, indicating a lack of proper training, installation workmanship and quality control by the power company.

[288] Exhibit 4, Response to Data Request No. 10, p. 16.
[289] Deposition of James Coppedge, dated May 14, 2004, pp. 84-85, attached as Exhibit 16.

- Page PC 6152 depicts an electric secondary riser fastened to the pole and riser conduit. As soon as the conduit ends, the secondary flares out into a long loop out from the pole. The explanation notes that the "violation could have been avoided if the conduit had been extended a minimum of 40 inches above communications." Although this is a correct statement, it should have clarified that the ***electric*** conduit should have been extended.

- Page PC 6153 states that there is a clearance violation between electric power and communication and cites NESC Rule 235C1 and Table 235-5. However, this photo does not show a violation and the rule cited does not apply. The rule that actually applies to this photo is 239G1 not 235C1. Rule 239G1 requires guarding of certain supply (power) conductors attached to the pole and passing through the communications space on the pole. However, Exception 1 of that same rule (239G1) provides that the guarding may be omitted for supply cables meeting Rule 230C1. The supply cables depicted in PC 6153 meet the Rule 230C1 requirement and do not require guarding.

- Pages 6161 and 6162 show a technique that is rare in the electric utility industry, but commonplace in Salt Lake City. It is used by the power company to avoid setting an additional pole, but violates NESC Rule 235C2b every time a 30-inch separation from communications is not maintained. The notes on these sheets indicate that there are violations with the cable facilities because there are less than 30 inches of separation. These are clearly electric violations and responsibility should not be assigned to the cable operator.

- Page PC 6131 states that "[a]ll cables have a 12" separation between cables other telecommunications cables (sic). NESC (sic) rule 235C1, 235H." The next line of this instruction refers to measurements for road clearance. However, road clearance has nothing to do with 12" at-pole separation. In addition, NESC rule 235C1 has nothing to do with 12" separation issues.[290]

Considering the errors that Mr. Harrelson uncovered in reviewing only *some* of the materials PacifiCorp provided, Comcast has ample reason to suspect that many of the violations PacifiCorp identified are false positives.

X. THE OPINIONS CONTAINED IN THE PRE-FILED TESTIMONY OF PACIFICORP'S WITNESS THOMAS JACKSON ARE WITHOUT MERIT

To support its view that penalties are a reasonable way of ensuring that communications joint users do not make unauthorized attachments to its poles and that Comcast

[290] *See* Harrelson Rebuttal Testimony, pp. 8-14.

likely did attach to 35,000 new poles in the last four years, PacifiCorp offers the testimony of Thomas Jackson. PacifiCorp also proffered Mr. Jackson in an effort to discredit the testimony of Comcast's expert, Michael T. Harrelson, P.E. Mr. Jackson is currently Vice President for Marketing, essentially a sales position for an electric utility pole attachment consultancy known as Utility Support Systems, Inc. ("USS"). Mr. Jackson's testimony consists essentially of an his opinion that Comcast could have attached to 35,000 new poles in a four or five-year period, impressions about the situation in Utah based on his 30 years of experience with Georgia Power, but not any review of the evidence it Utah, and a series of insinuations that Mr. Harrelson misunderstands joint use. Mr. Jackson's views—at least as set forth in the text of his testimony—are a conclusory, superficial rubber stamp of PacifiCorp's conduct.

There are two critical elements of Mr. Jackson's submission, however, that are extremely helpful in resolving this dispute. First, Mr. Jackson offers absolutely no opinion on the $250 charge that PacifiCorp has imposed on Comcast. He states that some penalty is warranted, but he is deafeningly silent on whether the $250 amount is reasonable. Second, in support of his opinion that a $50 penalty is warranted, he attaches to his testimony and endorses a form agreement that Georgia Power began using in 1991. Even though this agreement contains a penalty amount that exceeds the maximum allowed by the *Mile-Hi* case, which as indicated earlier caps unauthorized attachment penalties at five years' back rent, it contains reasonable solutions to the items most immediately in dispute in this proceeding. It also directly contradicts Mr. Jackson's testimony and PacifiCorp's fundamental position that there simply is no place for reasonable informal agreements between the pole owner and joint users.

This 1991 Georgia Power agreement that Mr. Jackson endorses is a model of reasonableness which the Commission should consider adopting:

> In the event that the number of poles to which Licensee has attached its facilities differs from the number shown in Licensor's records, the difference shall be prorated over the period since the last such accounting. If this results in an increase in the number of poles to which Licensee has attached for any year during such period, Licensee shall forthwith pay to Licensor the fees due for such poles for such years, and if it results in a decrease in the number of poles to which Licensee has attached for any year during such period, Licensor shall forthwith refund to Licensee the fees previously paid for such poles for such years or to the date of this Agreement, whichever is later.
>
> Unauthorized pole attachments which exceed 3% of Licensee's total permits shall be billed at the rate of $50.00 per unauthorized pole attachment plus the appropriate pole attachment rental fee(s) for the preceding year(s). Attachments previously authorized by Licensor's local personnel; attachments to poles previously owned by other companies, or treated as owned by other companies, now owned by Licensor; attachments to in-line drop-in poles; and drop attachments to lift (or spot) poles shall not be treated as unauthorized pole attachments, but shall be subsequently added to Licensor's records for payment of pole rental fees. Licensee has the burden of persuasion that said pole attachments meet any of these criteria. Licensee shall have a period of six (6) months from the date of this contract to report to Licensor all attachments without payment of $50.00 per attachment plus attachment fees.

These provisions are clearly worded to pro-rate the cable operator's attachment count over the period of years since the last count for pole rental purposes was conducted. The licensee is accorded a 3% margin, plus a margin for all drop or lift poles (which typically serve only a single building, and are used to keep clearances above roadways and yards and usually are only contacted when there is a specific request for service). Only if the total count exceeds these numbers will the cable operator be assessed the $50 penalty. It is not entirely clear if the 3% margin is an annual margin, but if it were, it would compound to a 16% increase in five years, and that is without including the lift poles, which could be significant. Finally, the 1991 Georgia Power Agreement gives the cable operator a six-month amnesty period in which to report attachments without incurring the $50 fee.

Whatever efforts Mr. Jackson and PacifiCorp undertake to discredit Mr. Harrelson and his testimony, the Commission should consider the last several years of Mr. Jackson's career at Georgia Power were marked by intense litigation stemming from the failed efforts of Georgia Power, and its sister companies (Alabama Power, Gulf Power and Savannah Electric) to do away with federal pole-attachment regulation.[291] Scarred, perhaps, from that doomed effort to eliminate the very regulatory environment that has allowed for the proliferation of advanced competitive broadband communications networks, Mr. Jackson's partisan views are hard to miss.

Contrast this background and legacy to that of Comcast's expert, Mickey Harrelson. Since leaving Georgia Power in 1992, Mr. Harrelson has been a consulting engineer and expert witness to communications companies, investor-owned utilities, electric cooperatives, industrial companies and others on issues of joint use and aerial plant safety. He has participated in more than 20 pieces of litigation as consultant and been qualified as an expert in the NESC, National Electric Code ("NEC") OSHA and other safety rules and regulations, aerial plant engineering construction and maintenance. Mr. Harrelson managed and was otherwise involved with joint use practices for nearly as long as Mr. Jackson, but his focus was on (literally) the nuts and bolts of protecting the utility's infrastructure, plant and worker safety and accommodating

[291] *See Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999).; *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 16 FCC Rcd. 12103 (2001), *aff'd sub nom. Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003) (refusing electric utility's challenge to FCC cable formula methodology and discarding $38.81 per pole rental rate); *Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, 18 FCC Rcd. 9599 (rel. May 13, 2003) (denying pole owner's $38 per pole rate and applying FCC cable television formula rental rate);[291] *See Complaint of Comcast Cablevision of GA/SC, Inc.; US Cable of Coastal TX v. Savannah Electric & Power Co.*, P.A. No. 02-001 (filed Jan 14, 2002); *Comcast Cablevision of GA/SC, Inc.; US Cable of Coastal TX v. Savannah Electric & Power Co.*, Order, 18 FCC Rcd. 15312 (2003).

[291] *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 17 FCC Rcd. 19859 (2002), *aff'd sub nom. Georgia Power Co. v. Teleport Communications Atlanta, Inc.*, 346 F.3d 1043 (11th Cir. 2003) (rejecting utility's $53.35 pole attachment rental rate and affirming constitutionality of FCC formula for providers of telecommunications services).

joint use. From the time that he started working in his father's electrician's business as a boy more than 45 years ago, this is, and always has been, Mr. Harrelson's focus.

Turning his attention to the matters in this proceeding, Mr. Harrelson concludes that (1) the $250 unauthorized attachment fee is unreasonable; (2) that PacifiCorp's claim that Comcast built 1,000 miles of new plant and has attached to more than 35,000 poles in the last four years is not credible; (3) that PacifiCorp's attempts to assign responsibility for massive plant clean-ups by taking unfounded positions with respect to the NESC and plant safety are unreasonable; and (4) that fines for supposed safety violations, are unreasonable.

As to the issues on which Mr. Jackson disagrees with Mr. Harrelson (*i.e.*, other than the $250 penalty amount), the basis for Mr. Jackson's disagreements are cursory, impressionistic and based only on his past experience with Georgia Power, rather than of any particularized or considered review of the facts in this case. For example, in order ostensibly to counter Mr. Harrelson's contention that Comcast did not build 1,000 miles of new plant between 1999 and 2003 Mr. Jackson states that he has seen "a 20% increase in attachments in the number of poles found during a five-year period." While ambiguous, if he means that he has seen a cable system increase the number of poles that it has attached to by 20% in a five year period, that is not unheard of. What *is* unheard of is a fully developed cable system in urban and developed suburban areas experiencing a 20% increase in the number of attachments in a five-year period. Mr. Jackson does not say that he has encountered ***that*** situation.

With respect to Mr. Harrelson's detailed testimony regarding both PacifiCorp's safety practices with respect to its own plant and what it has claimed that Comcast is responsible for addressing, Mr. Jackson says absolutely nothing. Mr. Jackson's testimony should be evaluated in light of these factors.

XI. CONCLUSION

For the reasons set forth herein, and consistent with Comcast's request for Agency Action and its other submissions in this proceeding, Comcast request the following relief:

(1) An immediate refund of the entire amount of the approximately $5.4 million that Comcast has paid to PacifiCorp in connection with the 2003 Audit, plus interest;

(2) An order denying and declaring invalid PacifiCorp's claim that Comcast has made "unauthorized attachments" to PacifiCorp poles;

(3) An order declaring the unauthorized attachment penalty amount of $250 per attachment unjust, unreasonable and unlawful;

(4) An order declaring that the maximum penalty unlawful that PacifiCorp shall be permitted to charge for future audits shall not exceed five years' back rent per pole;

(5) An order directing the parties to establish a base line number of poles to which Comcast is attached presently that shall be used for the purposes of future billings and any future inventories or audits of Comcast attachments to PacifiCorp poles;

(6) An order declaring unjust, unreasonable and unlawful any PacifiCorp imposition or attempted imposition of fines or penalties for purported Comcast "safety" violations on PacifiCorp poles;

(7) An order directing the parties to negotiate in good faith a just and reasonable plan, including a fair, just, and reasonable allocation of cost and other responsibility, for addressing *bona fide* safety issues that exist on PacifiCorp poles utilizing the principles set forth in the National Electrical Safety Code ("NESC");

(8) An order directing the parties to negotiate a just, fair and reasonable pole attachment agreement;

(9) An order granting such other relief as is just, reasonable and proper.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2004, an original, eight (8) true and correct copies, and an electronic copy of the foregoing **PRE-HEARING BRIEF** were hand-delivered to:

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